

T H E
New Instructor Clericalis,
STATING THE
AUTHORITY, JURISDICTION, and MODERN PRACTICE
OF THE
Court of Common Pleas.

With Directions for commencing and defending Actions,
entering up Judgments, suing out Executions, and
Proceeding in Error.

TO WHICH ARE ADDED,

The Rules of the Court, Modern Precedents, and several
other Matters necessary to be known by Attornies and
their Clerks,

IN TOWN AND COUNTRY.

The whole illustrated by useful NOTES and OBSERVATIONS
from the best Authorities, with the Addition of a Complete
INDEX.

By J. G. H. N. IRLPEY, ESQ.
INNER TEMPLE.

L O N D O N :

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P R I . A C E .

THE favourable reception of the new *Instructor Clericalis* in the *King's Bench*, has induced the author to believe, that a similar publication, on the practice of the *Common Pleas*, will not be unacceptable to the profession.

THE history of this court has already been deduced, and the theory of its practice delineated, by a very masterly hand *. But such a performance, without further assistance, will no more make a good practical lawyer, than the elements of *Euclid* alone will make a good mechanic.

To furnish that assistance, is the professed object of the following work;

* Lord Chief Baron *Gilbert*, in his *History and Practice of the Common Pleas*.

wherein, .

P R E F A C E.

wherein, as in ~~the~~ former, the author has endeavoured to select such *matter* only as may be truly useful; and to arrange it in such *method*, as to afford the readiest means of intelligence.

It is not however on any supposed merit of his own, that he founds his hopes of success; but on the great experience and abilities of the *officers* of the court,—to whose communication he is indebted, for much useful and authentic information.



THE
Authority and Jurisdiction
OF THE
Court of Common Pleas.

BY the *Saxon* constitution there was one superior court of justice in the kingdom: and that had cognizance both of civil and spiritual causes; viz. the *wittemagemot*, or general council, which assembled annually or oftner, wherever the king kept his *easter*, *christmas*, or *whituntide*, as well to do private justice, as to consult on publick business. At the conquest, the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, made up of the officers of his palace, and they transacted the business, both criminal and civil; likewise matters of the revenue. When they sat in the hall, they were called a court *criminal*, when up stairs, a court of *revenue*; the *civil pleas* they held in either court. This court was called by *Bracton* and other authors, *aula regia*,

gia, or *aula regis*. *Bract. lib. 3. c. 7.* These high officers were assisted by certain persons learned in the laws, who were called the king's *justiciars* or *justices*, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise matters of the revenue: and over all presided one special magistrate, called the *chief justiciar*, or *capituli justiciarius totius Angliæ*; who was also principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. And through this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him. *Spelman's Gloss. 331, 2, 3. Gil. C. P. 17.*

This great universal court being bound to follow the king's household in all its progresses and expeditions, the trial of common causes therein was found very burthensome to the subject. When fore king *John*, who dreaded also the power of the *justiciar*, very readily consented to that article which now forms the eleventh chapter of *magna charta*, and enacts, "that *Common Pleas shall not follow our Court, but shall be holden in some place certain.*" This certain place was established in *Westminster-hall*, the place where
the

the *aula regis* originally sat, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a chief, with other justices of the common pleas thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject: Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in it's neighbourhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it.

The *aula regia* being thus stripp'd of so considerable a branch of it's jurisdiction, and the power of the chief *justiciar* being also considerably curb'd by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of *Henry* the third: And, in further pursuance of this example, the other several offices of the chief *justiciar* were under *Edward* the first (who new-modelled the whole frame of our judicial polity) subverted and broken into distinct courts of judicature. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a cheque upon each other; the court of chancery issuing all original writs under the great seal to the other courts; •

The Authority and Jurisdiction

the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench, retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown, or criminal causes: For pleas or suits are regularly divided into two sorts; *pleas of the crown*, which comprehend all crimes and misdemeanors, wherein the king (on behalf of the publick) is plaintiff; and *common pleas*, which include all civil actions, depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas; which is a court of record, and is styled by Sir *Edward Coke*, "*the lock and key of the common law*;" 4 *Inst.* 99. for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal pleas between man and man are here determined; though in the latter the king's bench has also a concurrent authority.

This court, without any writ, may, upon a suggestion, grant prohibitions, to keep as well temporal as ecclesiastical courts within their bounds and jurisdiction, without any original or plea depending; for the common law, which in these cases is a prohibition of itself, stands instead of an original. 4 *Inst.* 99. *Vaugb.* 157. 12 *Co.* 108.

Actions

of the Court of Common Pleas.

Actions are also removed into this court out of inferior courts of record, by writ of *habeas corpus cum causa*, or *certiorari*; and out of inferior courts not of record, by *pone*, *tolt*, *recordari*, *accedas ad curiam*, or writ of *false judgment*.

In term time, it may award a *habeas corpus* by the common law, for any person committed for any cause under *treason*, or *felony*, and thereupon discharge him, if it shall clearly appear by the return, that the commitment was against law; as being made by one who had no jurisdiction of the cause, or for a matter for which, by law, no man ought to be punished. *Vaugh.* 154. 2 *Jones*, 14. And now it is clear, that this court has a general jurisdiction to grant writs of *habeas corpus*, in all cases. 2 *Wils*, 172. *Wood's Case*. 1 *And.* 297. *Moor* 839. 1132. 1 *Brownl.* 33. It also hath jurisdiction for the punishment of it's own officers and ministers, and all other persons guilty of contempts against the rules and orders of the court.

It's jurisdiction is general, and extends throughout *England*, and by statute of *Gloucester*, 6 *Ed.* 1. c. 8. "None shall have writs of trespass before justices, unless he swear by his faith, that the goods taken away were worth 40s."

Lord *Coke* in his 2 *Inst.* 311. says, "writs of trespass are here put but for an example, for debt, detinue, covenant, and the like."

And as inferior courts which are not of record cannot hold plea of debt, &c. or damages, but under 40s. so the superior

The Authority and Jurisdiction

courts that are of record cannot hold plea of debt, &c. or damages regularly, unless the same amount to 40s. or above, *ibid.* For the wisdom of the common law was, that men should not be troubled for suits of small value in the king's courts, but that they should be heard and determined in the county with small charge, and little or no travel or loss of time, for it was there accounted against the dignity and institution of those high courts to hold plea of small or trifling causes; otherwise the law that was instituted for the quiet of man, and for his defence, might be abused to his charge, vexation, and offence. And the maxim of the common law is, *quod placita de catallis, debitis, &c. quæ summum 40s. attingunt, vel eam excedunt, secundum legem et consuetudinem Angliæ, sine brevi Regis placitari non debent, ibid* 312.

By 43 Eliz. c. 6. it is enacted, " That if
 " any personal action be brought in any of
 " her Majesty's courts at *Westminster* (not
 " being for any title or interest of lands, nor
 " concerning the freehold or inheritance of
 " any lands, nor for any battery), it shall
 " appear to the judges of the same court;
 " and being so signified by the justices be-
 " fore whom the same shall be tried, that
 " the debt or damages to be recovered
 " therein shall not amount to the sum of
 " 40s. that in every such case the judges or
 " justices before whom such action shall be
 " pursued, shall not award the plaintiff any
 " more costs than the sum of the debt or
 " damages so recovered shall amount to
 " but less at their discretion."

If

of the Court of Common Pleas.

If upon a nonsuit in an inferior court 16s. is given for costs, by 23 H. 8. c. 15. debt lies for it in the superior court, because it is given by a statute subsequent to the 6 Ed. 1. Cro. Eliz. 96.

The style of this court is, "*Pleas at Westminster before Alexander Lord Loughborough, and his companions justices of our lord the king of the bench, of the term of the Holy Trinity, in the twenty-third year of the reign of our Sovereign Lord George the third by the grace of God of Great Britain, France and Ireland, king, defender of the faith, &c.*"

The authority of this court in common cases is founded on an original writ issuing out of the chancery, being the king's mandate from them to proceed to determine the cause; for it was a *maxim* among the Normans that there should be no proceedings in the king's court in common pleas, without the king's writ; therefore a writ always issued to warrant this court's proceedings.

But where the party is privileged, as an attorney or other person intitled thereto, it may hold plea on a writ of privilege, which is the first process of the court issued against the defendant, to compel him to appear, and make his defence.

It also holds plea by bill, which is in nature of a petition to the court, against any attorney, officer, or minister, intitled to privilege; and expresses either the grievance or wrong which the plaintiff hath suffered by the defendant, or else some fault by him committed against some law or statute of the realm.

The Authority and Jurisdiction, &c.

Also a knight, citizen, or burghers, or other person intitled to privilege of parliament, may be sued in this court by original bill, in manner as directed by the statute 12 & 13 *W. 3. c. 3.* and a *peer*, by the practice of the court, may also be sued by original bill, and summons; though this is doubted to be law.

Of the Laws of England.

LAW, in general, is an art directing to the knowledge of justice, and to the well-ordering of civil society; so the law of *England* in particular, is an art to know what is justice in *England*, and to preserve order in that kingdom. And this law may be divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.

The *lex non scripta*, or unwritten law, includes not only general customs, or the common law, but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions; and are properly distinguished into three kinds: 1. *General Customs*; which are the universal rule of the whole kingdom, and form the common law, in it's stricter and more usual signification. 2. *Particular Customs*; which, for the most part, affect only the inhabitants of particular districts.

3. *Certain*

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3. *Certain particular Laws*; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

1. As to *general customs*, or the *common law*, properly so called, this is that law, by which the proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance, the manner and form of acquiring and transferring property, the solemnities and obligations of contracts; the rules of expounding *wills*, deeds, and acts of parliament, the respective remedies of civil injuries, the several species of temporal offences, with the manner and degree of punishment, and an infinite number of minute particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires.

2. *Particular customs*, are those which belong to particular counties, cities, towns, manors, and lordships, and these were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large, which privilege is confirmed to them by several acts of parliament, *Mag. C. rt. 9 H. 3. c. 9. 1 Ed. 3. ff. 2. c. 9. 14 Ed. 3. ff. 1. c. 1. Et 2. H. 4. c. 1.*

Such is the custom of gavelkind in *Kent* and some other parts of the kingdom. *Vide Co. Litt. 140.* Also the custom that prevails in divers ancient boroughs, and therefore called *Borough-English*, that the youngest son

son shall inherit the estate, in preference to all his elder bothers. *Co. Litt.* 140. b. Such is the custom in other boroughs, that a widow shall be entitled for her dower, to all her husband's lands. *Co. Litt.* 166; but at the common law she is entitled to one third part only. Lastly, there are many particular customs within the city of *London* with regard to trade, apprentices, widows, orphans, &c. All these are contrary to the general law of the land, and are good only by special usage; though the customs of *London* are confirmed by act of parliament. 8 *Rep.* 126. *Cro. Car.* 347. 2 *W. & M. c.* 8. *ft.* 3.

To this may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants, or *lex mercatoria*: which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions. *Winch.* 24.

Customs must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is not, as Sir *Edward Coke* says, to be understood by every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. *Co. Litt.* 62. *Coke's Copyb. f.* 33.

Customs ought to be certain. A custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next of male blood; exclusive
of

of females, is certain, and therefore good.
R l. Abr. 565. A custom to pay two pence an acre in lieu of tythes, is good; but to pay sometimes two pence, and sometimes three pence, as the occupier of the land pleases, is bad, for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain; for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest.* *Co. Lit. 33. b.*

Customs, though established by consent, must be (when established) compulsory; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom that every man is to contribute thereunto at his own pleasure, is idle and absurd, and indeed no custom at all.

Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows; for these two contradictory customs cannot be both good, nor both stand together. He ought rather .

Of the Laws

to deny the existence of the former custom.
9 *Rep.* 58.

The written laws, or *leges scriptæ*, are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, 8 *Rep.* 20. And they are either *general* or *special*, *publick* or *private*.

A general or publick act, is an universal rule that regards the whole community: and of this the courts of law are bound to take notice judicially and *ex officio*, without the statute being particularly pleaded, or set forth by the party who claims an advantage under it.

Special or *private acts*, are rather exceptions than rules; being those which only operate upon particular persons and private concerns: and of these the judges are not bound to take notice, unless they be formerly shewn and pleaded. Thus to shew the distinction, the statute 13 *Eliz. c.* 10. to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a publick act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of *Chester*, to make a lease to *A. B.* for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Statutes also are either *declaratory* of the common law, or remedial of some defect therein. Declaratory, where the old custom
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of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament hath thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is, and ever hath been. Thus the statute of treasons, 25 *Ed. 3. cap. 2.* doth not make any new species of treason; but only for the benefit of the subject declares and enumerates those several kinds of offence, which before were treason at the common law.

Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned judges, or from any other causes whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament, into *enlarging* and *restraining* statutes. As for instance, clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law: therefore it was thought expedient, by *statute 5 Eliz. c. 11.* to make it *high treason*, which was not at the common law; so that this was an enlarging statute. At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 *Eliz.* before mentioned:

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tioned: this was therefore a restraining statute.

It may be said that part of the civil and canon law are also a part of the laws of *England*; they being in force in causes litigated in the spiritual courts, and the courts of admiralty.

Of Actions.

AN action is the form of a suit given by law, for the recovery of that which is one's due; or it is a legal demand of a man's right; and invented to preserve men's persons and properties from the violence and injustice of others: it does in all instances of an injury being committed, either inflict a punishment upon the party offending, or give a recompence to the party injured. The design of entering into society being the protection of our persons and security of our property, men in civil society have a right, and are indeed obliged to apply to the publick for redress when they are injured: for were they allowed to be their own carvers, or to make reprisals, which they might do in the state of nature, such permission would introduce all that inconvenience which the state of nature did endure, and which government was at first invented to prevent. Hence therefore they are obliged to submit to the publick the measure of their damages, and to have recourse to the law and the courts of justice, which

which are appointed to give them redress and ease in their affairs: and this application is what we call bringing an action.

They are *criminal or civil*.

Criminal, which lies for some penalty or punishment in the party sued, be it corporal or pecuniary, and are called actions penal.

Popular actions, whereby a man hath committed a breach of some penal statute; and it is called a popular action, because it is not given to one *specially* but *generally* to any that will *prosecute* as well for *himself* as the king, and it is generally called a *qui tam* action; because it is brought by a person "*qui tam pro domino rege, &c. quam pro se ipso in hac parte sequitur.*" Dyer 95. *Lutw.* 133. 138.

Civil actions, are divided into *real*, *personal*, and *mixed*. *Real*, which concern real property only, are such whereby the plaintiff or demandant claims title to any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life: but these actions are now laid aside, being very dilatory and expensive; and a more commodious method is contrived to dispute the title of lands called an ejectment. *Co. Lit.* 284. 2 *Inst.* 40. Civil Action.

Personal actions, are *account*, *assumpsit*, *conventant*, *debt*, *assault and battery*, *false imprisonment*, *case* and *trespass*. Personal Actions.

Mixed actions, are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained; as for instance, ejectment, which intitles the plain- Mixed Actions.

tiff not only to restitution for the term of years, but also damages for the wrong; waste not only to recover the land wasted, but also treble damages, which is a personal recompence; and under these three heads may every species of remedy by suit or action be comprized.

Account.

Account, lays against the bailiff, or receiver to a lord, or others, who, by reason of their offices and businesses, are to render account, but refuse to do it; and by *Stat. 4 Ann. c. 16*. "It may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than his share, and against their executors and administrators:" but this action is seldom used, the proceedings being difficult, dilatory, and expensive; for if the demand be of consequence, and the matter of an intricate nature, it is more adviseable to resort to a court of equity.

Assumpsit, is an action founded upon a contract, either express or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract: there are two sorts, a general *indebitatus assumpsit*; and a *special assumpsit*.

Indebit. assumpsit.

Indebitatus assumpsit, will lie in no case but where debt will lie; and therefore it will not lie upon a wager, nor against the acceptor of a bill of exchange: for his acceptance is but a collateral engagement.

Salk.

Sall. 23. pl. 3. 6. Mod. 128. 2 Ld. Raym. 1034. therefore it must be for a particular undertaking, or collateral promise to discharge the debt or duty of another; as for not making a good title to land sold according to promise; not paying money upon a bargain and sale according to agreement; not delivering goods upon promise on demand, &c.

Implied assumpsit, is where goods are sold, or work is done, without any price agreed upon a *quantum meruit*; the law implies a promise and satisfaction to the value: and there is another implied *assumpsit*, which is, when one has received money belonging to another, without any valuable consideration given on the receiver's part. It also lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where undue advantage is taken of the plaintiff's situation. *4 Burr. 1012.* For money laid out and expended for the use of another, the law implying a promise of payment, and upon an account stated. *Carib. 446.*

Covenant arises where an agreement is made Covenant. by deed, or writing sealed, between two persons at the least, each to perform certain covenants on his part, and as the good of society requires a punctual performance of, and that no person should be allowed to rescind and break through his contracts, so the law has provided a remedy by action of covenant, in which the injured party is to recover damages for the violation of the contract,

tract, in proportion to the loss he has sustained.

Debt.

Debt. This action was formerly very much used, but now is seldom brought, but upon special contracts under seal, wherein the sum due is clearly and precisely expressed, and matters of record; for if brought upon simple contract, the plaintiff labours under two difficulties: first, the defendant has here the same advantage (as in action of detinue), that of waging his law if he thinks proper. 4 Rep. 94. And secondly, the plaintiff must recover the whole debt he claims, or nothing at all. For the debt is one single cause of action fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued.

Assault.

Assault lies where there is an attempt or offer, with force and violence, to do a corporal hurt to another, as by striking him with or without a weapon, or presenting a gun at him at such a distance to which the gun will carry, or pointing a pitchfork at him, or by drawing a sword, and waving it in a menacing manner. 2 Roll. Abr. 545. Hawk. P. C. 133. And it seems agreed at this day, that no words whatsoever, be they never so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary. Hawk. P. C. 134.

Battery is the unlawful beating of another. The least touching of another person wilfully or in anger, is a battery; for the law cannot draw the line between different degrees

Of Actions.

degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. *6 Mod. 173. 149. Vent. 255.* Every battery includes an assault, therefore if the defendant be found guilty of the battery, it is sufficient. *Salk. 384. pl. 36. Hawk. Pl. Cr. 134.*

Any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry or revengeful, rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law. *6 Mod. 149. Ld. Raym. 62. Hawk Pl. Cr. 13.*

Assault and False Imprisonment. This action Assault and Imprisonment. lies for every confinement of the person without sufficient authority, and is commonly joined to an assault and battery; for every imprisonment includes a battery, and every battery an assault; and to constitute the injury, there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. *2 Inst. 589. 46.*

Case. This action lies in a great variety of instances, viz. For affecting a man's reputation or good name, by malicious, scandalous, and slanderous words, tending to his damage and derogation. *Hob. 120.* An assumpsit, or undertaking, by affecting a man's health, where, by any unwholesome practices of another, a man suffers any apparent damage in his vigor or constitution.

as by selling him bad provision or wines, 1 *Roll. Abr.* 95. *Bro. Guarranty.* 59.; by the exercise of a noisome trade which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. 11 *H.* 6. 18. *Roll. Abr.* 10. 12. Against carriers and others upon the custom of *England.* *Stat.* 10 *Ann.* c. 14. Innkeepers for goods stolen in his house whilst he is a guest, *Moor* 177; for deceits in contracts, bargains, and sales, *Danv.* 73; for negligence; keeping a dog accustomed to bite sheep, 1 *Ken.* 190.; taking or enticing away my servant or apprentice, whereby I lose his service, 1 *Cro.* 177.; disturbance in the use of a seat in the church, *Moor.* 197.; for injuries done in commons, *Style* 168.; for malicious prosecutions, conspiracy, escape, and rescous, *Roll. Abr.* 112. 1 *Salk.* 15.; for stopping up a water-course or way; breaking down a party wall; stopping of antient lights, and for any private nuisance to a man's walls, light, or air, 3 *Inst.* 231. 9 *Rep.* 54.; against Sheriffs for default in executing writs, 1 *Cro.* 477; for disturbing a parson in taking his tithes, &c. 2 *Cro.* 478.

Trover.

Trover is a special action on the case which one man hath against another, who hath in his possession any of his goods by delivery, finding, or otherwise; and sells or makes use of them without his consent, or refuses to deliver them on demand; and it is to recover damages to the value of the goods. 2 *Lil. Abr.* 618.

This action will lie, although there be not an actual finding; for wherever a man comes

to

to the possession of the goods of another by delivery, and does convert the same to his own use, that is a sufficient finding to found the action. 2 *Bulf.* 313. And if the plaintiff recovers damages for the conversion, the property of the goods does thereupon rest in the defendant; who, as damages to the value of his goods have been recovered against him, is to be considered as a purchaser of them. *Str.* 1078.

Detinue, is an action that lies for the recovery of goods and chattels though the party came to the possession of them by lawful means, as by bailment, borrowing, or pledging, and the plaintiff is to recover the thing in specie or damages for the detainer; but as in this action the defendant is allowed to wage his law (for it was but reasonable that the bailor trusting to the bailiff's honesty and integrity at first, should also trust to his oath in a court of justice, since the restitution might have been secret), which being found exceeding inconvenient, it being often experienced that those who were so dishonest as to retain the goods of another; would generally put themselves upon their oaths, occasioned the substituting the action of trover and conversion in the place thereof, which being the action usually made use of at this day. *Co. Lit.* 286. *Roll. Abr.* 575. 10 *Co.* 57. a. *Cro. Jac.* 244.

Trespass lies for an injury done by one private man to another, as entering on another man's ground without a lawful authority; and doing some damage, however inconsiderable, to his real property. For the right

of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; every entry thereon, without the owner's leave, and (if contrary to his express order) is a trespass or transgression. The party must have property in the soil, and actual possession by entry, to be able to maintain it; or, at least, it is requisite, that the party have a lease and possession of the vesture and herbage of the land. *Moor* 456. 1 *Inst.* 57. 2 *Roll. Abr.* 572. 2 *Lill. Abr.* 596. 2 *Roll. Abr.* 545.

Personal property.

The person in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring thereof by a stranger, although he has never been in the actual possession of it: For a general property does always draw to it a possession in law; which possession is, in the case of a personal chattel, by reason of the transitoriness of its nature, sufficient to found an action of trespass upon. *Bro. Tresp.* 303. pl. 346. *Latch.* 2 4. 2 *Bullstr.* 268.

Real property.

Only the person, who has the possession in fact of the real property to which an injury has been done, can maintain an action of trespass for the injury: Because the gist of an action of trespass, for an injury to either real or personal property, is the being disturbed in the possession of the property: And the having a general property, does not in the case of real property, as it does in the case of personal, draw to it a possession in fact,

fact. *Bro. Tr. pl. 38. pl. 303. pl. 346.*
3 Lev. 209. Latch. 263. 2 Bulstr. 268.

And there must not only be a possession in fact of the real property to which an injury has been done; but it must be a lawful one. For an intruder into land does not gain by the intrusion such a possession, as will enable him to maintain an action for a trespass thereupon committed. *2 Leon. 147. Plow. 546. 4 Leon. 184.*

Every one of the parties to a trespass is liable to an action, for there can be no accessory to a trespass. *1 Lev. 124. Bro. Tit. Tre. 115.*

For whom and against whom an Action will lie.

AS the law grants redress for all injuries, and gives a remedy for every kind of right, so it is open to all kinds of persons, and none are excluded from bringing an action, except on account of their crimes or their country; as men attainted of treason or felony, persons outlawed or excommunicated, convict in a *præmunire*, alien enemies professed in orders of the papal religion, as friars, monks, &c. (unless they have obtained a pardon) infants, feme-coverts (unless by special custom), or persons not *in rerum natura*; but executors or persons outlawed have a right to sue in right of their testator or intestate, *1 Inst. 128.*

For whom and against whom

They may be brought against all persons whether attainted of treason or felony, a convict recusant outlawed, and excommunicated, &c. 6 *Rep.* 3.

But care must be taken how such actions are brought, as if an infant is plaintiff, he must sue by his next friend or guardian, *Roll. Abr.* 287, 288.; unless he sue with others as executor, and then he may sue by attorney, for all of them together represent the testator. *Roll. Abr.* 288. If an infant is sued, he must appear by a guardian; if not, the plaintiff may move the court to have one appointed. *Roll. Rep.* 303. *Style* 369. 2 *Inst.* 26. If an idiot sue or be sued, he must do it in person, *Co. Lit.* 135; but otherwise of him who shall become *non compos mentis*, for he shall appear by guardian if within age, or by attorney if of full age. 4 *Co.* 124. 1 *Saund.* 23. A married woman must sue with her husband; and in all cases where they are both sued (although the husband may answer alone), yet the wife shall never be forced to answer without her husband (except it be a sole merchant; *i. e.* when she carries on a sole and separate trade, which is by the custom of *London* only); and in that case the action must be against both. 10 *Mod.* 6. 1 *Inst.* 135. Executors, when they bring an action, must all be named; but when an action is brought against them, it must be only against such of them as do administer. 1 *Roll. Abr.* 924. *Jenk. Cent.* 106, 107.

Also, if two men have lands and goods, together in joint-tenancy, and be wronged

in them, they must sue jointly. *Co. Litt.* 180. Tenants in common ought to join in actions personal, as trespass in breaking into their house, breaking their inclosure or fences, feeding, washing, or defouling their grass, cutting down their timber, fishing in their piscary; and shall recover jointly their damages, because in those actions, though their estates are several, yet the damages survive to all; and it would be unreasonable to bring several actions for one single trespass. *Co. Lit. sett.* 315. *ibid.* 198. a. So if two tenants in common sow their land, and a stranger eateth the corn with his cattle, though they have the corn in common, yet the action given to them is joint, and shall survive. *Co. Litt.* 198. a. But in real actions, and in actions also that are mixed with the personalty, tenants in common shall sever in actions, because they have several freeholds, and claim by several titles. *Co. Litt.* 195. b. Also in an assize and slander of title, they must sever. Divers persons may have an action of trespass jointly for goods taken, or the like; but of battery, or such personal trespass, the action ought to be single: if one trespass be done by divers, the plaintiff may make it joint, or several, as he pleases. 8 *Rep.* 159. And yet two that join in a trespass, do so make one trespasser, that one of them is answerable for the other, and if they be sued in one action, they may sever in pleas and issues. *Str.* 1140. And a release to one, is a release to all. *Co. Litt.* 232. a. Also the jury must assess damages for all, but there shall be but one satisfaction; and where
a joint.

For whom and against whom, &c.

a joint-action doth lie against several persons, and some of their names are known, and some are not, the action may be brought against them that are known by their particular names, and declare with a *simul cum aliis*, &c. 2 *Lill. Abr.* 469. *Comb.* 260.

Within what time Actions are to be brought.

The limitation of prescription in a writ of right.

It seems that, by the common law, there was no stated or fixed time as to bringing of actions, for my Lord *Coke* says, 2 *Inst.* 95. "that the limitation of actions was 'by force of divers acts of parliament;' and in order to prevent suits and inconveniences, the Stat. 32 *H. 8. c. 2. sect. 1.* enacts, "That no person shall from henceforth sue, have or maintain, any writ of right, or make any prescription, title, or claim to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments of the possession of his or their ancestor or predecessor, and declare and alledge any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been or now is or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, within threescore years next before the *teste* of the same writ next before the said prescription,

“ scription, title, or claim, so hereafter to
 “ be sued, commenced, brought, made,
 “ or had.

Sect. 2. “ That no manner of person shall
 “ sue, have or maintain any assise of *Mort-* Limitation of
 “ *dauncestor, coufenage, ayle, writ of entry* prescription to
 “ *upon disseisin*, done to any of his ancestors actions posses-
 “ or predecessors, or any other action poss- sory.
 “ sessory upon the possession of any of his
 “ ancestors or predecessors, for any manors,
 “ lands, tenements, or other hereditaments,
 “ of any farther seisin or possession of his or
 “ their ancestor or predecessor, but only of
 “ the seisin or possession of his or their an-
 “ cestor or predecessor which was or here-
 “ after shall be seised of the same manors,
 “ lands, tenements, or other hereditaments,
 “ within fifty years next before the *teste* of
 “ the original of the same writ hereafter to
 “ be brought.

Sect. 3. “ That no person or persons shall
 “ hereafter sue, have or maintain any action Concerning
 “ for any manors, lands, tenements, or other suit for land
 “ hereditaments, of or upon his or their of his own
 “ own seisin or possession therein, above possession.
 “ thirty years next before the *teste* of the
 “ original of the same writ, hereafter to be
 “ brought.

Sect. 4. “ That no person shall hereafter Avowry or
 “ make any avowry or cognizance for any cognizance
 “ rent, suit, or service, and alledge any for any rent,
 “ seisin of any rent, suit, or service, in the suit, or service.
 “ same avowry or cognizance, in the posses-
 “ sion of any other, whose estate he shall
 “ pretend or claim to have, above fifty years
 “ next

- Formedons in reverter, formedons in remainder, *scire facias* upon *ant.*. See 2 Jac. 2. c. 16.
- Bar for default of seisin within the time of limitation.
- “ next before the making of the said avowry or cognizance.
- Sect. 5. “ That all formedons in reverter, formedons in remainder, and *scire facias* upon fines of any manors, lands, tenements, or other hereditaments, at any time hereafter to be sued, shall be sued and taken within fifty years next after the title or cause of action fallen, and at no time after the fifty years passed.
- Sect. 6. “ That if any person or persons, at any time hereafter, do sue any of the said actions or writs, for any manors, lands, tenements, or other hereditaments, or make any avowry, cognizance, prescription, title, or claim, of or for any rent, suit, service, or other hereditaments, and cannot prove that he or they, or his or their ancestors or predecessors, were in actual possession or seisin of and in the same manors, lands, tenements, rents, suits, services, annuities, commons, pensions, portions, corodies, or other hereditaments, at any time or times within the years before limited and appointed in this present act, and in manner and form as is aforesaid, if the same be traversed or denied by the party, plaintiff, demandant, or avowant, or by the party, tenant, or defendant; that then, and after such trial therein had, all and every such person and persons, and their heirs, shall from thenceforth be utterly barred for ever of all and every the said writs, actions, avowries, cognizance, prescription, title, or claim, hereafter

“ hereafter to be sued, had or made, of and
 “ for the same manors, lands, tenements,
 “ hereditaments, or other the premises, or
 “ any part of the same for which the same
 “ action, writ, avowry, cognizance, pre-
 “ scription, title, or claim, hereafter shall be
 “ at any time had, sued, or made.”

Proviso to relieve women covert, infants within age, in prison, or out of the realm, at the time of this Statute made, and that they may bring any of the said writs or actions, or make any of the said avowries, cognizances, prescriptions, titles or claims, at any time within six years next after such person shall accomplish the age of twenty-one, or within six years next after such person now being covert shall be sole, or within six years next after such person now being out of the realm shall come and be within this realm: And that every such person shall alledge within the six years the seisin of his or their ancestors or predecessors, or of his own possession, or of the possession of those whose estate he shall then claim. Proviso to relieve feme coverts, &c.

In the construction of this statute it hath been holden, that in a *formedon in reverter* or remainder, or on a *scire facias* on a fine of such nature, the demandant need not mention the statute in order to make out his title, but the tenant, if he would take advantage of it, must plead it. *Dyer* 315. b. pl. 101. So in an avowry for rent, *Moor* 31. pl. 102. 1 *Rel. Rep.* 50. this statute must be construed strictly; and that it does not extend to a *formedon in descender, cessavit*, nor *rescous*. 4 *Co.* 8. 1 *And.* 16. *Lit. Rep.* 314.

*

It

Within what time Actions

It does not extend to a writ of right of dower, for the plaintiff does not count of his possession, nor of the seisin of any ancestor.

Bro. St. Lim. 23.

Not to extend to any writ of right of advowson, *quare impedit*, &c.

By the 1 *Mar. c. 5.* it is enacted, "That the 32 *H. 8. c. 2.* shall not extend to any writ of right of advowson, *quare impedit*, or assize of *darreign presentment*, nor *jure patronatus*, not to any writ of right of ward, writ of ravishment of ward for the wardship of the body; or for the wardship of any castles, honors, manors, lands, tenements, or hereditaments, holden by knight-service; but that such suits may be brought as be the making the said act."

Writs of formedon shall be sued within 20 years.

By *Stat. 21 Jac. 1. c. 16.* For quieting men's estates, and avoiding of suits, be it enacted, "That all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought, of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session; and, after the said twenty years, no person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements, or hereditaments; and that all writs of formedon in descender, formedon in remainder, formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued
" or

“ or brought by occasion or means of any
 “ title or cause hereafter happening, shall be
 “ sued and taken within twenty years next
 “ after the title and cause of action first de-
 “ scended or fallen, and at no time after the
 “ said twenty years; and that no person or Entry into
 “ persons that now hath any right or title of land, &c. shall
 “ entry into any manors, lands, tenements, be made with-
in 20 year.
 “ or hereditaments, now held from him or
 “ them, shall thereinto enter, but within
 “ twenty years next after any other title of en-
 “ try accrued; and that no person or persons
 “ shall at any time hereafter make any
 “ entry into any lands, &c. but within twenty
 “ years next after his or their right or title
 “ which shall hereafter first descend or ac-
 “ crue to the same; and, in default thereof,
 “ such persons so not entering, and their
 “ heirs, shall be utterly excluded and disabled
 “ from such entry after to be made.”

“ Provided nevertheless, That if any per- Infants, feme-
coverts, &c.
excepted.
 “ son or persons that is or shall be entitled
 “ to such writ or writs, or that hath or shall
 “ have such right or title of entry, be, or
 “ shall be, at the time of the said right or
 “ title first descended, accrued, come or
 “ fallen, within the age of one and twenty
 “ years, *feme covert, non compos. mentis, im-
prisoned, or beyond the seas*, that then such
 “ person and persons, and his or their heir
 “ and heirs, shall or may, notwithstanding
 “ the said twenty years be expired, bring
 “ his action, or make his entry, as he might
 “ have done before this act: so as such per-
 “ son and persons, or his or their heir and
 “ heirs, shall, within ten years next after his
 “ and

“ and their full age, discoverture, coming of
 “ sound mind,, enlargement out of prison,
 “ or coming into this realm, or death, take
 “ benefit of, and sue forth the same, and at
 “ no time time after the said ten years.”

Construction
 of the statute.

In the contruction of this statute it hath
 been holden, that the possession of one joint-
 tenant is the possession of the other, so far as
 to prevent this statute; 1 *Salk.* 285. That a
 claime of entry to prevent the statute of
 limitations must be upon the land, unless
 there be some special reason to the contrary.
 1 *Salk.* 205. 2 *Str.* 1086. That if a person
 be barred of his formedon, he is not thereby
 hindred to pursue his right of entry which
 afterwards accrues to him, no more than a
 person who has several remedies, and dis-
 charges one of them, is excluded thereby
 from pursuing the others. 1 *Lutw.* 781.
 1 *Salk.* 339. 2 *Salk.* 422.

Tenants in
 common.

That if one tenant in common receives
 the whole profits for twenty years or more,
 yet this does not bar his companion; for the
 statute of limitations never runs against a
 man, but where he is actually ousted or dis-
 seised. 1 *Salk.* 423.

Copyholds.

Copyholds are within the statute, because
 it is an act made for the preservation of
 the public quiet, and no ways tending to
 the prejudice of the lord or tenant.
Moor 410.

Limitation of
 personal ac-
 tions.

By *stat.* 21 *Jac.* 1. c. 16. s. 3. “ All
 “ actions of trespass *quare clauum fregit*, de-
 “ *litue*, action for *trover*, and *replevin* for
 “ taking away of goods and cattle, all ac-
 “ tions of *account*, and upon the *case* (other
 “ than

" than such accounts as concern the trade of
 " merchandize between merchant and mer-
 " chant, their factors or servants,) all ac-
 " tions of *debt*, grounded upon any *lending*
 " or *contract* without *specialty*; all actions of
 " *debt* for arrearages of *rent*, and all actions
 " of *assault*, menace, battery, *wounding*, and
 " *imprisonment*, or any of them which shall
 " be sued or brought at any time after the
 " end of this present session of parliament,
 " shall be commenced and sued within the
 " time and limitation hereafter expressed;
 " and not after (that is to say) the said ac-
 " tions upon the *case* (other than for slander),
 " and the said actions for *account*, and the
 " said actions for *trespass*, *debt*, *detinue*, and
 " *replevin* for goods or cattle, and the said
 " action of *trespass*, *quare clausum fregit*,
 " within *six years next after the cause* of such
 " *actions* or *suit*, and not after; and the said
 " actions of *trespass*, of *assault*, *battery*,
 " *wounding*, *imprisonment*, or any of them,
 " within *four years next after the cause* of
 " such *actions* or *suit*, and not after; and
 " the said action upon the *case* for *words*,
 " within *two years next after the words spoken*,
 " and not after."

" That if in any the said actions or suits Their limit-
 " judgment be given for the plaintiff, and tation after
 " the same be reversed by error, or a verdict judgment or
 " pass for the plaintiff, and upon matter outlawry re-
 " alledged in arrest of judgment, the judg- versed.
 " ment be given against the plaintiff, that he
 " take nothing by his plaint, writ or bill;
 " or if any the said actions shall be brought
 " by original, and the defendant therein be

“ outlawed, and shall, after reverse the out-
 “ lawry, that in all such cases the party
 “ plaintiff, his heirs, executors or admini-
 “ strators, as the case shall require, may
 “ commence a new action or suit, from time
 “ to time within a year after such judgment
 “ reversed, or such judgment given against
 “ the plaintiff, or outlawry reversed, and
 “ not after.

Infants, feme
 covert, &c.
 excep.ed.

“ That if any person or persons, that is
 “ or shall be intitled to any such action of
 “ trespass, detinue, action for replevin, ac-
 “ tions of accompts, actions of debts, ac-
 “ tions of trespass for assault, menace, bat-
 “ tery, wounding or imprisonment; actions
 “ upon the case for words, be or shall be at
 “ the time of any such cause of action given
 “ or accrued, fallen, or come within the
 “ age of twenty-one years, *feme covert, non*
 “ *compos mentis, imprisoned, or beyond the seas,*
 “ that then such person or persons shall be
 “ at liberty to bring the same actions, so as
 “ they take the same within such times as
 “ are before limited, after their coming to,
 “ or being of full age, discover, of sane me-
 “ mory, at large, and returned from beyond
 “ the seas, as other persons having no such
 “ impediment, should be done.

If the plaintiff is in *England* when the cause
 of action accrues, the time of limitation be-
 gins to run, though he afterwards goes
 abroad. 1 *Wils.* 134. The statute does not
 begin to run against a foreigner, till he comes
 into *England*. 3 *Wils.* 145.

What actions
 are within the
 statute.

With respect to merchants accounts, it
 hath been determined, that they mean such
 accounts

accounts as are open and current only; and that therefore, if an account be stated and settled between merchant and merchant, and a sum certain agreed to be due to one of them, if he to whom the money is due, does not bring his action within the time limited, he is barred by the above statute. 2 Mod. 312. 2 Saund. 124. Lev. 287. Vent. 90. 2 Vern. 456.

Action on a bond is not within the statute; Action on yet the practice is, that where an action is brought on a bond of twenty years standing and on which no interest has been paid for that time, the defendant may plead *solvit ad diem*, and will be presumptive proof of the payment, if the plaintiff does not prove either the payment of the interest, or a demand precedent. In chancery, an obligee on a bond was refused any relief. Chan. Rep. 78. 88. 106.

Debt on the 6 Ed. 6. for tithes, or on an award for a fine of a copyhold, rent on an indenture of lease, or for an escape, are not within the statute. 1 Sid. 305. 2 Saund. 33. 37. 1 Lev. 273. Nor can the statute be pleaded by any sheriff to an action brought against him for money levied on a *scire facias*, because the action is founded in *maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute; and because it is grounded on the statute, 1 R. 2. c. 12. which first gave an action of debt for an escape, there being no remedy for creditors before, but by action on the case, Saund. 37. 1 Lev. 191. 2 Keb. 93.; nor can

tiff not only to restitution for the term of years, but also damages for the wrong; waste not only to recover the land wasted, but also treble damages, which is a personal recompence; and under these three heads may every species of remedy by suit or action be comprized.

Account.

Account, lays against the bailiff, or receiver to a lord, or others, who, by reason of their offices and businesses, are to render account, but refuse to do it; and by *Stat. 4 Ann. c. 16*. "It may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than his share, and against their executors and administrators:" but this action is seldom used, the proceedings being difficult, dilatory, and expensive; for if the demand be of consequence, and the matter of an intricate nature, it is more adviseable to resort to a court of equity.

Assumpsit, is an action founded upon a contract, either express or implied by law, and gives the party damages in proportion to the loss he has sustained by the violation of the contract: there are two sorts, a general *indebitatus assumpsit*, and a *special assumpsit*.

Indebit. assumpsit.

Indebitatus assumpsit, will lie in no case but where debt will lie; and therefore it will not lie upon a wager, nor against the acceptor of a bill of exchange: for his acceptance is but a collateral engagement.

Salk.

Salk. 23. pl. 3. 6. Mod. 128. 2 Ld. Raym. 1034. therefore it must be for a particular undertaking, or collateral promise to discharge the debt or duty of another; as for not making a good title to land sold according to promise; not paying money upon a bargain and sale according to agreement; not delivering goods upon promise on demand, &c.

Implied assumpsit, is where goods are sold, or work is done, without any price agreed upon a *quantum meruit*; the law implies a promise and satisfaction to the value: and there is another implied *assumpsit*, which is, when one has received money belonging to another, without any valuable consideration given on the receiver's part. It also lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where undue advantage is taken of the plaintiff's situation. *4 Burr. 1012.* For money laid out and expended for the use of another, the law implying a promise of payment, and upon an account stated. *Cartb. 446.*

Covenant arises where an agreement is made Covenant. by deed, or writing sealed, between two persons at the least, each to perform certain covenants on his part; and as the good of society requires a punctual performance of, and that no person should be allowed to rescind and break through his contracts, so the law has provided a remedy by action of covenant, in which the injured party is to recover damages for the violation of the con-

C

tract,

tract, in proportion to the loss he has sustained.

Debt. *Debt.* This action was formerly very much used, but now is seldom brought, but upon special contracts under seal, wherein the sum due is clearly and precisely expressed, and matters of record; for if brought upon simple contract, the plaintiff labours under two difficulties: first, the defendant has here the same advantage (as in action of detinue), that of waging his law if he thinks proper. 4 *Rep.* 94. And secondly, the plaintiff must recover the whole debt he claims, or nothing at all. For the debt is one single cause of action fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued.

Affault. *Affault* lies where there is an attempt or offer, with force and violence, to do a corporal hurt to another, as by striking him with or without a weapon, or presenting a gun at him at such a distance to which the gun will carry, or pointing a pitchfork at him, or by drawing a sword, and waving it in a menacing manner. 2 *Roll. Abr.* 545. *Hawk. P. C.* 133. And it seems agreed at this day, that no words whatsoever, be they never so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary. *Hawk. P. C.* 134.

Battery. *Battery* is the unlawful beating of another. The least touching of another person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees

degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. *6 Mod.* 173. 149. *Vent.* 256. Every battery includes an assault, therefore if the defendant be found guilty of the battery, it is sufficient. *Salk.* 384. *pl.* 36. *Haw.* *Pl. Cr.* 134.

Any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry or revengeful, rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law. *6 Mod.* 149. *Ld. Raym.* 62. *Haw.* *Pl. Cr.* 13.

Assault and False Imprisonment. This action ^{Assault and} lies for every confinement of the person ^{Imprison-} without sufficient authority, and is commonly joined to an assault and battery; for every imprisonment includes a battery, and every battery an assault; and to constitute the injury, there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. *2 Inst.* 589. 46.

Case. This action lies in a great variety of instances, *viz.* For affecting a man's reputation or good name, by malicious, scandalous, and slanderous words, tending to his damage and derogation, *Hob.* 138. on an assumpsit, or undertaking by affecting a man's health, where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution;

as by selling him bad provision or wines, 1 *Roll. Abr.* 95. *Bro. Guarranty.* 59.; by the exercise of a noisome trade which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. 1 *H. 6.* 18. *Roll. Abr.* 10. 12. Against carriers and others upon the custom of *England.* *Stat.* 10 *Ann. c.* 14. Innkeepers for goods stolen in his house whilst he is a guest, *Moor* 177; for deceits in contracts, bargains, and sales, *Danv.* 73; for negligence; keeping a dog accustomed to bite sheep, 1 *Ven.* 190.; taking or enticing away my servant or apprentice, whereby I lose his service, 1 *Cro.* 177.; disturbance in the use of a seat in the church, *Moor.* 197.; for injuries done in commons, *Style* 168.; for malicious prosecutions, conspiracy, escape, and rescous, *Roll. Abr.* 112. 1 *Salk.* 15.; for stopping up a water-course or way; breaking down a party wall; stopping of antient lights, and for any private nuisance to a man's walls, light, or air, 3 *Inst.* 231. 9 *Rep.* 54.; against Sheriffs for default in executing writs, 1 *Cro.* 477; for disturbing a parson in taking his tithes, &c. 2 *Cro.* 478.

Trover.

Trover is a special action on the case which one man hath against another, who hath in his possession any of his goods by delivery, finding, or otherwise; and sells or makes use of them without his consent, or refuses to deliver them on demand; and it is to recover damages to the value of the goods. 2 *Lil. Abr.* 618.

This action will lie, although there be not an actual finding; for wherever a man comes

to the possession of the goods of another by delivery, and does convert the same to his own use, that is a sufficient finding to found the action. 2 *Bulf.* 313. And if the plaintiff recovers damages for the conversion, the property of the goods does thereupon rest in the defendant; who, as damages to the value of his goods have been recovered against him, is to be considered as a purchaser of them. *Str.* 10/8.

Detinue, is an action that lies for the recovery of goods and chattels though the party came to the possession of them by lawful means, as by bailment, borrowing, or pledging, and the plaintiff is to recover the thing in specie or damages for the detainer; but as in this action the defendant is allowed to wage his law (for it was but reasonable that the bailor trusting to the bailiff's honesty and integrity at first, should also trust to his oath in a court of justice, since the restitution might have been secret), which being found exceeding inconvenient, it being often experienced that those who were so dishonest as to retain the goods of another; would generally put themselves upon their oaths, occasioned the substituting the action of trover and conversion in the place thereof, which being the action usually made use of at this day. *Co. Lit.* 286. *Roll. Abr.* 575. 10 *Co.* 57. a. *Cro. Jac.* 244.

Trespass lies for an injury done by one private man to another, as entering on another man's ground without a lawful authority; and doing some damage, however inconsiderable, to his real property. For the right

of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; every entry thereon, without the owner's leave, and (if contrary to his express order) is a trespass or transgression. The party must have property in the soil, and actual possession by entry, to be able to maintain it; or, at least, it is requisite, that the party have a lease and possession of the vesture and herbage of the land. *Moor* 456. 1 *Inst.* 57. 2 *Roll. Abr.* 572. 2 *Lill. Abr.* 596. 2 *Roll. Abr.* 545.

Personal property.

The person in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring thereof by a stranger, although he has never been in the actual possession of it: For a general property does always draw to it a possession in law; which possession is, in the case of a personal chattel, by reason of the transitoriness of its nature, sufficient to found an action of trespass upon. *Bro. Tresp.* 303. pl. 346. *Latch.* 214. 2 *Bulstr.* 268.

Real property.

Only the person, who has the possession in fact of the real property to which an injury has been done, can maintain an action of trespass for the injury: Because the gist of an action of trespass, for an injury to either real or personal property, is the being disturbed in the possession of the property: And the having a general property, does not in the case of real property, as it does in the case of personal, draw to it a possession in fact.

fact. *Bro. Tr. pl. 38. pl. 303. pl. 346.*
3 Lev. 209. Latch. 263. 2 Bulstr. 268.

And there must not only be a possession in fact of the real property to which an injury has been done; but it must be a lawful one. For an intruder into land does not gain by the intrusion such a possession, as will enable him to maintain an action for a trespass thereupon committed. *2 Leon. 147. Plow. 546. 4 Leon. 184.*

Every one of the parties to a trespass is liable to an action, for there can be no accessory to a trespass. *1 Lev. 124. Bro. Tit. Tre. 115.*

For whom and against whom an Action will lie.

AS the law grants redress for all injuries, and gives a remedy for every kind of right, so it is open to all kinds of persons, and none are excluded from bringing an action, except on account of their crimes or their country; as men attainted of treason or felony, persons outlawed or excommunicated, convict in a *præmunire*, alien enemies professed in orders of the papal religion, as friars, monks, &c. (unless they have obtained a pardon) infants, feme-coverts (unless by special custom), or persons not *in rerum natura*; but executors or persons outlawed have a right to sue in right of their testator or intestate, *1 Inst. 128.*

For whom and against whom

They may be brought against all persons whether attainted of treason or felony, a convict recusant outlawed, and excommunicated, &c. 6 Rep. 3.

But care must be taken how such actions are brought, as if an infant is plaintiff, he must sue by his next friend or guardian, *Roll. Abr.* 287, 288.; unless he sue with others as executor, and then he may sue by attorney, for all of them together represent the testator. *Roll. Abr.* 288. If an infant is sued, he must appear by a guardian; if not, the plaintiff may move the court to have one appointed. *Roll. Rep.* 303. *Style* 369. 2 *Inst.* 26. If an idiot sue or be sued, he must do it in person, *Co. Lit.* 135; but otherwise of him who shall become *non compos mentis*, for he shall appear by guardian if within age, or by attorney if of full age. 4 *Co.* 124. 1 *Saund.* 234. A married woman must sue with her husband; and in all cases where they are both sued (although the husband may answer alone), yet the wife shall never be forced to answer without her husband (except it be a sole merchant; i. e. when she carries on a sole and separate trade, which is by the custom of *London* only); and in that case the action must be against both. 10 *Mod.* 6. 1 *Inst.* 135. Executors, when they bring an action, must all be named; but when an action is brought against them, it must be only against such of of them as do administer. 1 *Roll. Abr.* 924. *Jenk. Cent.* 106, 107.

Also, if two men have lands and goods, together in joint-tenancy, and be wronged

in them, they must sue jointly. *Co. Litt.* 180. Tenants in common ought to join in actions personal, as trespass in breaking into their house, breaking their inclosure or fences, feeding, washing, or defouling their grass, cutting down their timber, fishing in their piscary; and shall recover jointly their damages, because in those actions, though their estates are several, yet the damages survive to all; and it would be unreasonable to bring several actions for one single trespass. *Co. Lit. sett.* 315. *ibid.* 198. a. So if two tenants in common sow their land, and a stranger eateth the corn with his cattle, though they have the corn in common, yet the action given to them is joint, and shall survive. *Co. Litt.* 198. a. But in real actions, and in actions also that are mixed with the personalty, tenants in common shall sever in actions, because they have several freeholds, and claim by several titles. *Co. Litt.* 195. b. Also in an assize and slander of title, they must sever. Divers persons may have an action of trespass jointly for goods taken, or the like; but of battery, or such personal trespass, the action ought to be single: if one trespass be done by divers, the plaintiff may make it joint, or several, as he pleases. 8 *Rep.* 159. And yet two that join in a trespass, do so make one trespasser, that one of them is answerable for the other, and if they be sued in one action, they may sever in pleas and issues. *Str.* 1140. And a release to one, is a release to all. *Co. Litt.* 232. a. Also the jury must assess damages for all, but there shall be but one satisfaction; and where
a joint-

For whom and against whom, &c.

a joint-action doth lie against several persons, and some of their names are known, and some are not, the action may be brought against them that are known by their particular names, and declare with a *simul cum aliis*, &c. 2 *Lil. Abr.* 469. *Comb.* 260.

Within what time Actions are to be brought.

The limitation of prescription in a writ of right.

It seems that, by the common law, there was no stated or fixed time as to bringing of actions, for my Lord *Coke* says, 2 *Inst.* 95. “ that the limitation of actions was by “ force of divers acts of parliament;” and in order to prevent suits and inconveniencies, the Stat. 32 *H.* 8. c. 2. *sect.* 1. enacts, “ That no person shall from henceforth “ sue, have or maintain, any writ of right, or “ make any prescription, title, or claim to or “ for any manors, lands, tenements, rents, “ annuities, commons, pensions, portions, “ corodies, or other hereditaments of the “ possession of his or their ancestor or predecessor, and declare and alledge any further “ seisin or possession of his or their ancestor “ or predecessor, but only of the seisin or possession of his ancestor or predecessor, which “ hath been or now is or shall be seised of “ the said manors, lands, tenements, rents, “ annuities, commons, pensions, portions, “ corodies, or other hereditaments, within “ threescore years next before the *teste* of “ the same writ next before the said prescription,

“ scription, title, or claim, so hereafter to
 “ be sued, commenced, brought, made,
 “ or had.

Sect. 2. “ That no manner of person shall
 “ sue, have or maintain any assise of *Mort-* Limitation of
 “ *dauncestor, coufenage, ayle, writ of entry* prescription to
 “ *upon disseisin*, done to any of his ancestors actions posses-
 “ or predecessors, or any other action pos-
 “ sefory upon the possession of any, of his
 “ ancestors or predecessors, for any manors,
 “ lands, tenements, or other hereditaments,
 “ of any farther seisin or possession of his or
 “ their ancestor or predecessor, but only of
 “ the seisin or possession of his or their an-
 “ cestor or predecessor which was or here-
 “ after shall be seised of the same manors,
 “ lands, tenements, or other hereditaments,
 “ within fifty years next before the *teste* of
 “ the original of the same writ hereafter to
 “ be brought.

Sect. 3. “ That no person or persons shall
 “ hereafter sue, have or maintain any action Concerning
 “ for any manors, lands, tenements, or other suit for land
 “ hereditaments, of or upon, his or their of his own
 “ own seisin or possession therein, above possession.
 “ thirty years next before the *teste* of the
 “ original of the same writ, hereafter to be
 “ brought.

Sect. 4. “ That no person shall hereafter
 “ make any avowry or cognizance for any Avowry or
 “ rent, suit, or service, and alledge any cognizance
 “ seisin of any rent, suit, or service, in the for any rent,
 “ same avowry or cognizance, in the posses- suit, or service
 “ sion of any other, whose estate he shall
 “ pretend or claim to have, above fifty years
 “ next

- Formedons in reverter, formedons in remainder, *seire facias* upon fines. See 2 Jac. 2. c. 16.
- Bar for default of seisin within the time of limitation.
- “ next before the making of the said avowry
 “ or cognizance.
- Sect. 5. “ That all formedons in reverter,
 “ formedons in remainder, and *seire facias*
 “ upon fines of any manors, lands, tene-
 “ ments, or other hereditaments, at any
 “ time hereafter to be sued, shall be sued
 “ and taken within fifty years next after the
 “ title or cause of action fallen, and at no
 “ time after the fifty years passed.
- Sect. 6. “ That if any person or per-
 “ sons, at any time hereafter, do sue any
 “ of the said actions or writs, for any ma-
 “ nors, lands, tenements, or other heredita-
 “ ments, or make any avowry, cognizance,
 “ prescription, title, or claim, of or for any
 “ rent, suit, service, or other hereditaments,
 “ and cannot prove that he or they, or his
 “ or their ancestors or predecessors, were in
 “ actual possession or seisin of and in the
 “ same manors, lands, tenements, rents,
 “ suits, services, annuities, commons, pen-
 “ sions, portions, corodies, or other heredi-
 “ taments, at any time or times within the
 “ years before limited and appointed in
 “ this present act, and in manner and form
 “ as is aforesaid, if the same be traversed or
 “ denied by the party, plaintiff, demandant,
 “ or avowant, or by the party, tenant, or
 “ defendant; that then, and after such trial
 “ therein had, all and every such person and
 “ persons, and their heirs, shall from thence-
 “ forth be utterly barred for ever of all and
 “ every the said writs, actions, avowries,
 “ cognizance, prescription, title, or claim,
 “ hereafter

“ hereafter to be sued, had or made, of and
 “ for the same manors, lands, tenements,
 “ hereditaments, or other the premises, or
 “ any part of the same for which the same
 “ action, writ, avowry, cognizance, pre-
 “ scription, title, or claim, hereafter shall be
 “ at any time had, sued, or made.”

Proviso to relieve women covert, infants within age, in prison, or out of the realm, at the time of this Statute made, and that they may bring any of the said writs or actions, or make any of the said avowries, cognizances, prescriptions, titles or claims, at any time within six years next after such person shall accomplish the age of twenty-one, or within six years next after such person now being covert shall be sole, or within six years next after such person now being out of the realm shall come and be within this realm: And that every such person shall alledge within the six years the seisin of his or their ancestors or predecessors, or of his own possession, or of the possession of those whose estate he shall then claim. Proviso to relieve feme coverts, &c.

In the construction of this statute it hath been holden, that in a *formedon in reverter* or remainder, or on a *scire facias* on a fine of such nature, the demandant need not mention the statute in order to make out his title, but the tenant, if he would take advantage of it, must plead it. *Dyer* 315. b. pl. 101. So in an avowry for rent, *Moor* 31. pl. 102. 1 *Rel. Rep.* 50. this statute must be construed strictly; and that it does not extend to a *formedon in descender, cessavit*, nor *rescous*. 4 Co. 8. 1 *And.* 16. *Lit. Rep.* 314. Construction.

Within what time Actions

It does not extend to a writ of right of dower, for the plaintiff does not count of his possession, nor of the seisin of any ancestor.

Bro. St. Lim. 23.

Not to extend to any writ of right of advowson, *quare impedit*, &c.

By the 1 *Mar. c. 5.* it is enacted, "That the 32 *H. 8. c. 2.* shall not extend to any writ of right of advowson, *quare impedit*, or assize of *darreign presentment*, nor *jure patronatus*, not to any writ of right of ward, writ of ravishment of ward for the wardship of the body; or for the wardship of any castles, honors, manors, lands, tenements, or hereditaments, holden by knight-service; but that such suits may be brought as be the making the said act."

Writs of formedon shall be sued within 20 years.

By *Stat. 21 Jac. 1. c. 16.* For quieting men's estates, and avoiding of suits, be it enacted, "That all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought, of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session; and, after the said twenty years, no person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements, or hereditaments; and that all writs of formedon in descender, formedon in remainder, formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued
" or

“ or brought by occasion or means of any
 “ title or cause hereafter happening, shall be
 “ sued and taken within twenty years next
 “ after the title and cause of action first de-
 “ scended or fallen, and at no time after the
 “ said twenty years; and that no person or ^{Entry into}
 “ persons that now hath any right or title of ^{land, &c. shall}
 “ entry into any manors, lands, tenements, ^{be made with-}
 “ or hereditaments, now held from him or ^{in 20 year.}
 “ them, shall thereinto enter, but within
 “ twenty years next after any other title of en-
 “ try accrued; and that no person or persons
 “ shall at any time hereafter make any
 “ entry into any lands, &c. but within twenty
 “ years next after his or their right or title
 “ which shall hereafter first descend or ac-
 “ crue to the same; and, in default thereof,
 “ such persons so not entering, and their
 “ heirs, shall be utterly excluded and disabled
 “ from such entry after to be made.”

“ Provided nevertheless, That if any per- ^{Infants, feme-}
 “ son or persons that is or shall be entitled ^{coverts, &c.}
 “ to such writ or writs, or that hath or shall ^{excepted.}
 “ have such right or title of entry, be, or
 “ shall be, at the time of the said right or
 “ title first descended, accrued, come or
 “ fallen, within the age of one and twenty
 “ years, *feme covert, non compos, mentis, im-*
 “ *prisoned, or beyond the seas*, that then such
 “ person and persons, and his or their heir
 “ and heirs, shall or may, notwithstanding
 “ the said twenty years be expired, bring
 “ his action, or make his entry, as he might
 “ have done before this act: so as such per-
 “ son and persons, or his or their heir and
 “ heirs, shall, within ten years next after his
 “ and

“ and their full age, discoverture, coming of
 “ sound mind, enlargement out of prison,
 “ or coming into this realm, or death, take
 “ benefit of, and sue forth the same, and at
 “ no time time after the said ten years.”

Construction
 of the statute.

In the contruption of this statute it hath
 been holden, that the possession of one joint-
 tenant is the possession of the other, so far as
 to prevent this statute; 1 *Salk.* 285. That a
 claim of entry to prevent the statute of
 limitations must be upon the land, unless
 there be some special reason to the contrary.
 1 *Salk.* 205. 2 *Str.* 1086. That if a person
 be barred of his formdon, he is not thereby
 hindred to pursue his right of entry which
 afterwards accrues to him, no more than a
 person who has several remedies, and dis-
 charges one of them, is excluded thereby
 from pursuing the others. 1 *Lutw.* 781.
 1 *Salk.* 339. 2 *Salk.* 422.

Tenants in
 common.

That if one tenant in common receives
 the whole profits for twenty years or more,
 yet this does not bar his companion; for the
 statute of limitations never runs against a
 man, but where he is actually ousted or dis-
 seised. 1 *Salk.* 423.

Copyholds.

Copyholds are within the statute, because
 it is an act made for the preservation of
 the public quiet, and no ways tending to
 the prejudice of the lord or tenant.
Moor 410.

Limitation of
 personal ac-
 tions.

“ By *stat.* 21 *Jac.* 1. c. 16. s. 3. “ All
 “ actions of trespass *quare clauum fregit*, de-
 “ linue, action for trover, and replevin for
 “ taking away of goods and cattle, all ac-
 “ tions of *account*, and upon the case (other
 “ than

“ than such accounts as concern the trade of
 “ merchandize between merchant and mer-
 “ chant, their factors or servants,) all ac-
 “ tions of *debt*, grounded upon any *lending*
 “ or *contract* without *specialty*; all actions of
 “ *debt* for arrearages of *rent*, and all actions
 “ of *assault*, menace, battery, *wounding*, and
 “ *imprisonment*, or any of them which shall
 “ be sued or brought at any time after the
 “ end of this present session of parliament,
 “ shall be commenced and sued within the
 “ time and limitation hereafter expressed,
 “ and not after (that is to say) the said ac-
 “ tions upon the *case* (other than for slander),
 “ and the said actions for *account*, and the
 “ said actions for *trespass*, *debt*, *detinue*, and
 “ *replevin* for goods or cattle, and the said
 “ action of *trespass*, *quare clausum fregit*,
 “ within *six years next after the cause* of such
 “ *actions* or *suit*, and not after; and the said
 “ actions of *trespass*, of *assault*, *battery*,
 “ *wounding*, *imprisonment*, or any of them,
 “ within *four years next after the cause* of
 “ such *actions* or *suit*, and not after; and
 “ the said action upon the *case* for *words*,
 “ within two years next after the *words spoken*,
 “ and not after.”

“ That if in any the said actions or suits Their limita-
 “ judgment be given for the plaintiff, and tion after
 “ the same be reversed by error, or a verdict judgment or
 “ pass for the plaintiff, and upon matter outlawry re-
 “ alledged in arrest of judgment, the judg- versed.
 “ ment be given against the plaintiff, that he
 “ take nothing by his plaint, writ or bill;
 “ or if any the said actions shall be brought
 “ by original, and the defendant therein be

Within what time Actions

“ outlawed, and shall after reverse the out-
 “ lawry, that in all such cases the party
 “ plaintiff, his heirs, executors or admini-
 “ strators, as the case shall require, may
 “ commence a new action or suit, from time
 “ to time within a year after such judgment
 “ reversed, or such judgment given against
 “ the plaintiff, or outlawry reversed, and
 “ not after.

Infants, feme
 coverts, &c.
 excepted.

“ That if any person or persons, that is
 “ or shall be intitled to any such action of
 “ trespass, detinue, action for replevin, ac-
 “ tions of accompts, actions of debts, ac-
 “ tions of trespass for assault, menace, bat-
 “ tery, wounding or imprisonment; actions
 “ upon the case for words, be or shall be at
 “ the time of any such cause of action given
 “ or accrued, fallen, or come within the
 “ age of twenty-one years, *feme covert, non*
 “ *compos mentis, imprisoned, or beyond the seas,*
 “ that then such person or persons shall be
 “ at liberty to bring the same actions, so as
 “ they take the same within such times as
 “ are before limited, after their coming to,
 “ or being of full age, discoverty, of sane me-
 “ mory, at large, and returned from beyond
 “ the seas, as other persons having no such
 “ impediment, should be done.

If the plaintiff in *England* when the cause
 of action accrues, the time of limitation be-
 gins to run, though he afterwards goes
 abroad. 1 *Wils.* 134. The statute does not
 begin to run against a foreigner, till he comes
 into *England*. 3 *Wils.* 145.

What actions
 are within the
 statute.

With respect to merchants accounts, it
 hath been determined, that they mean such
 accounts

accounts as are open and current only; and that therefore, if an account be stated and settled between merchant and merchant, and a sum certain agreed to be due to one of them, if he to whom the money is due, does not bring his action within the time limited, he is barred by the above statute. 2 Mod. 312. 2 Saund. 124. Lev. 287. Vent. 90. 2 Vern. 456.

Action on a bond is not within the statute; Action on yet the practice is, that where an action is brought on a bond of twenty years standing and on which no interest has been paid for that time, the defendant may plead *solvit ad diem*, and will be presumptive proof of the payment, if the plaintiff does not prove either the payment of the interest, or a demand precedent. In chancery, an obligee on a bond was refused any relief. Chan. Rep. 78. 88. 106.

Debt on the 6 Ed. 6. for tithes, or on an award for a fine of a copyhold, rent on an indenture of lease, or for an escape, are not within the statute. 1 Sid. 303. 1 Saund. 33. 37. 1 Lev. 273. Nor can the statute be pleaded by any sheriff to an action brought against him for money levied on a *fieri facias*, because the action is founded in *maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute, and because it is grounded on the statute, 1 R. 2. c. 12. which first gave an action of debt for an escape, there being no remedy for creditors before, but by action on the case, Saund. 37. 1 Lev. 191. 2 Keb. 93.; nor can

bond not.

Sheriff cannot plead the statute.

it be pleaded to an action on the judgment. 1 *Mod.* 205. 212. A charity is not bound by length of time, 2 *Vern.* 399.; a legacy is not within the statute, 1 *Vern.* 256.; nor a mortgage. 1 *Chan. Cases* 102.

Scan. Mag.
not within
the statute.

Slander of
title not.

For words, this does not extend to *scandalum magnatum*, nor to cases where the special damage is the gist of the action; but where the words of themselves are actionable, special damage will not take them out of the statute. 1 *Sid.* 95. *Saund.* 61. Nor to actions for slander of title, for that is not properly slander, but a cause of damage; and the slander intended by the statute is to the person. *Cro. Car.* 141. *Palm.* 530. *Jones* 196.

If words are
of themselves
actionable,
they are with-
in the statute.

If the words of themselves are actionable, without the necessity of alledging special damages, although a loss ensues, yet in this case the statute of limitations is a good bar; but if the words, at the time of the speaking them, are not actionable, but a subsequent loss ensues, which entitles the plaintiff to his action, in such case the statute is no bar. *Sid.* 95. *Ray.* 61. 3 *Mod.* 111. As for calling a woman a whore, by which she lost her marriage seven years afterwards, the statute is no bar; for it is not the words, but the special damage, which is the cause of action in this case. *Sid.* 95. *Salk.* 206. *pl.* 5. And that was incumbent on the plaintiff to prove the special damage, otherwise the action would not have laid for the words.

Trespass *per*
quod servitium
amissit, is not
within the
statute.

Trespass and assault. If trespass be brought for beating a servant *per quod servitium amissit*, this is not such an action as is within the statute,

statute, being founded on the special damage.
Salk. 206.

By 3 & 4 *Ann. c.* 9. Actions on promissory notes shall be brought within the time appointed for actions upon the case.

By 4 *Ann. c.* 16. All suits in the admiralty for seamen's wages shall be commenced in six years after the cause of Action.

By the 31 *Eliz. c.* 5. *f.* 5. " All actions,
" suits, bills, indictments, or informations,
" which, after twenty days next after the end
" of this session of parliament, shall be had,
" brought, sued, or exhibited for any forfeiture
" upon any statute penal, made or to
" be made, whereby the forfeiture, is, or shall
" be limited to the queen, her heirs or suc-
" cessors only, shall be had, brought, sued,
" or exhibited within two years after the
" offence committed, or to be committed
" against such act penal, and not after two
" years: And that all actions, suits, bills,
" or informations, which, after the said
" twenty days shall be had, brought, sued,
" or commenced for any forfeiture upon
" any penal statute made or to be made,
" except the statutes of tillage, the be-
" nefit, and suit whereof, is or shall be by
" the said statute limited to the queen,
" her heirs or successors, and to any
" other which shall prosecute in that be-
" half, shall be had, brought, sued, or
" commenced, by any person that may
" lawfully pursue for the same, as aforesaid,
" within one year next after the offence
" committed, or to be committed, against
" the

Within what time Actions

“ the said statute; and in default of such
 “ pursuit, that then the same shall be
 “ had, sued, exhibited, or brought for
 “ the queen’s majesty, her heirs or suc-
 “ cessors, at any time within two years
 “ after that year ended: And if any
 “ action, suit, bill, indictment, or informa-
 “ tion for any offence against any penal
 “ statute made or to be made, except the
 “ statute of tillage, shall be brought after
 “ the time in that behalf before limited,
 “ that then the same shall be void and of
 “ none effect.

“ Provided, that where any informa-
 “ tion, indictment, or other suit, is or
 “ shall be limited by any statute penal, to
 “ be had, sued, commenced, or brought
 “ within shorter time than is afore-rehearsed,
 “ that in every such case, the action,
 “ &c. or other suit, shall be brought
 “ within the time limited by such statute.
 “ *Stat. 6.*”

No officer
 shall receive or
 file any in-
 formation, &c.
 unless oath be
 made by the
 party, &c.

By 21 *Jac.* 1. c. 4. “ No officer shall
 “ receive, file, or enter of record, any in-
 “ formation, bill, plaint, count, or declara-
 “ tion, grounded on any penal statute,
 “ (being within the statute of the 21 *Jac.*)
 “ until the informer or relator hath first
 “ taken a corporal oath before some of the
 “ judges of the court, that he believes in
 “ his conscience the offence was com-
 “ mitted within a year before the in-
 “ formation or suit, within the county
 “ where the said information or suit was
 “ commenced.”

In construction of these statutes, it hath been holden, 1. That the 21 *Jac. 1. c. 4.* does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby. *Salk. 372. pl. 13. 5 Mod. 425. Str. 1081.* 2. That an offence prohibited by any penal statute, be also an offence at common law; the prosecution of it, as of an offence at common law, is no way restrained by any of these statutes. *Hob. 270. 4 Mod. 144.* 3. That if a suit on any penal statute be brought after the time limited, the defendant need not plead the statute, but may take advantage of it under the general issue. *Show. 353.* 4. That the party grieved is not within the restraint of these statutes, but may sue in the same manner as before. *Cro. Eliz. 645. Noy 71. 3 Leon. 237. Show. 354. Carth. 233.*

An action of debt was brought on the 9 *Ann. c. 14.* by a common informer against Sir *Thomas Frederik* for winning 525*l.* of *G. L.* at cards. The money was lost and paid, 11 *March* 1757, and the original not sued out till *Mich. 1762.* This court held it a case within 31. *El.* though the action given in the first instance was to the party grieved, and after to the common informer alone; for such action would have been within 7 *H. 8.* and the 31 *Eliz.* was made to narrow the time given by that statute, and therefore could never mean to leave any actions unrestrained in time; the latter part of the clause must therefore be construed to extend to

~~them.~~ *Lookin v. Sir Thomas Frederick.*
M. 6 Geo. 3. Buller's nisi prius, 190.

A *capias* being produced is sufficient to shew that the action is brought in due time.

When an action is limited by a statute to be commenced within a certain time, a *capias ad respondendum*, sued out within that time may be produced in evidence at the trial, to prove that the action was commenced in due time, *3 Wils. 465*. But if the writ was not sued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonsuited. *Morris and Harwood, M. 3 Geo. 3, Bull. nisi prius, 135.*

OF THE Proceedings in this Court.

IT has been already observed, that this court cannot hold plea in ordinary cases, without the king's original writ, therefore the plaintiff, in a personal action, was, in the first instance, obliged to make out a *præcipe* for the same, and apply to the curfitor of the county in which his cause of action arose, who made it out returnable in this court.

The original is a mandatory letter from the king, Original, in parchment, sealed with his great seal, and directed to the sheriff of the county, requiring him to command the party accused either to do justice to the complainant, or else appear in court, and answer the accusation,

These writs are either *optional* or *peremptory*, and called by the names of a *præcipe quod reddat*, or a *fi te fecerit securum*, and, for shortness, a *pone*.

The *præcipe quod reddat* is, in the alternative, commanding the defendant to do the thing required, or shew the reason wherefore he hath not done it: the use of this writ is, where something certain is demanded by the plaintiff; as to restore the possession of his land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like; in all which cases the writ is drawn up in the form of a *præcipe* or *command*, to do thus, or shew cause to the contrary; giving the defendant his choice, to redress the injury or stand the suit.

The *fi te fecerit securum*, directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim.

This

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This writ is in use where nothing specifically is demanded, but only a satisfaction in general. Such are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim.

This security is common to both writs, and formerly were responsible persons taken by the sheriff, to answer for the plaintiff, if he failed in the action, to such amercement as the court should set on him for raising a false accusation; the sufficiency of whom the sheriff was liable to the king.

On receipt of either of these writs, the sheriff made out his summons to the defendant, directed to his *bailiffs*, called *summoners*, who either summoned him personally, or left the same at his house or place of abode.

On this summons the defendant either appeared, or *essoigned* or made default; if he appeared, the plaintiff then proceeded against him by delivering a declaration. If he *essoigned* (that is, sent his excuse by a servant for not appearing), the excuse was to be sent on the day the writ was returnable; for if he omitted that day, an exception might be entered the next day to his *non-appearance*, and the plaintiff might have an order that the defendant's *essoign* or *excuse* be not received; from this *exception* so taken and entered, the second day after the return of the writ, was called the day of *exception*: the third day the sheriff returned his writ into court, which was delivered into the custody of the *custas breviarum*, and from thence, this day was called the day of *returna breviarum*; then it was, this court was seised of the cause by the possession of the writ. The fourth day was called the day of *appearance*, or *dies amoris*, which was the time granted *ex gratia*, for the party to appear: "for our sturdy ancestors held it beneath the condition of a freeman to be obliged to appear, or to do any other act at the precise time appointed or required."

“ *required.*” If the defendant did not then appear, the plaintiff offered himself, and the filacer recorded his appearance, and the sheriff’s return, that he either summoned the defendant, or that the defendant had nothing by which he could be summoned: if the sheriff returned *summonire feci*, then he awarded an attachment and distress infinite, if the action was in debt; but in trespass, because there was a fine to the king, the king’s process (which was a *capias*) was awarded, or a distress as the court thought proper; but if the sheriff returned, that the defendant had nothing by which he could be summoned, then the *capias* was awarded even in debt, by Stat. 25 Ed. 3. c. 17. and in actions on the case by the 19. H. 7. c. 9. If the defendant could not be arrested on the *capias*, the *capias* being returned *non est inventus*, and filed with the *custos brevium*, the plaintiff, upon application, might have an *alias* and *pluries*; and upon the like return, the plaintiff might sue the defendant to outlawry, by which he forfeited all his goods, lost the profits of his land, and was liable, if taken, to be imprisoned.

Before the Stat. 19 H. 7. c. 9. which allowed the writ of *capias ad respondendum* in actions on the case, a practice was introduced in this court, of commencing the suit by an original writ of trespass *quare clausum fregit*, for breaking the plaintiff’s close *vi et armis*, which, by the old common law, subjected the defendant’s person to be arrested by writ of *capias*: and then afterwards, by connivance of the court, the plaintiff might proceed to prosecute for other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expence, in suing out a *special original* adapted to the particular injury) still continues in almost all cases (except in actions of debt), for if the defendant appeared at the return of the writ, or on the *distringas*, the plaintiff might declare against him in any action he should think proper, and, after judgment, purchase a *special original* to warrant

The present
Practice.

warrant the proceeding, which would prevent the judgment being arrested or reversed.

This was the regular and orderly mode of proceeding; but now the usual practice is, to sue out a *capias* in the first instance, upon a supposed return of the sheriff of the original.

Originally, if the sheriff found the defendant, he was obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For not having obeyed the original summons, he had shewn a contempt of the court, and was no longer to be trusted at large; but when the summons fell into disuse, and the *capias* became the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases, by the gradual indulgence of the courts (at length authorized by *Stat. 12 Geo. 1. c. 29.* amended by the *5 Geo. 2. c. 27.* and made perpetual by *Stat. 21 Geo. 2. c. 3.*), the defendant is now only to be personally served with a true copy of the writ, with notice in writing directed to him, to appear by his attorney in court to defend the action; which in effect reduces it to the summons of the sheriff. And if the defendant thinks proper to appear at the return, he enters the same with the proper filacer; but if he does not appear on the return day of the writ, or within eight days after, the plaintiff may, upon an affidavit made of the service of a true copy of such writ, cause an appearance to be entered for him, pursuant to the Statute of the *12 Geo. 1. c. 29.* and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make affidavit, or assert upon oath, that the cause of action amounts to ten pounds or upwards, then, in order to arrest the defendant, and make him put in substantial sureties for his appearance, called *special bail*, it is required by *Stat. 13 Car. 2. §. 2. c. 2.* that the true cause of action should be expressed in the body of the writ;
as,

as, "that the said defendant may answer to the plaintiff of a plea of trespass in breaking his close: and also," *ac-etiam*, "may answer him, according to the custom of the court, in a certain plea of trespass on the case, upon promises, to his damage of 20l."

This statute had like to have ousted the king's bench of all its jurisdiction over civil injuries without force: for, as the bill of *Middlesex* was framed for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts: but to remedy this inconvenience, the officers devised the method of adding the clause of *ac-etiam* to the usual complaint of trespass. In imitation of which, Lord Chief Justice North, a few years afterwards, in order to save the suitors of this court the trouble and expence of suing out *special originals*, directed the clause of *ac-etiam* also to be inserted in the *capias*.

The sum sworn to by the plaintiff is marked upon the back of the writ; and the sheriff, or his officer the bailiff, is then obliged actually to arrest or take into custody the body of the defendant, and having so done, to return the writ (when called on by a rule for that purpose), with a *cepi corpus* indorsed thereon.

When the defendant is arrested, he must either go to prison for safe custody, or put in *special bail* to the sheriff, to appear in court at the return; which is effected by entering into a bond to the sheriff in double the sum sworn to, with one or more sureties, who are to be *substantial* and *responsible men*, to insure the defendant's appearance at the return of the writ; which obligation is called a *bail bond*. *Vide Stat. 12 Geo. 2. c. 29.*

Within four days exclusive of the appearance day of the return of the writ, the defendant must put in bail above, that is, enter into a recognizance (if they live in *London* or *Westminster*, or within ten miles thereof) before one of the justices of this court (the defendant not being present), in double the

Recognizance of the sum sworn to by the plaintiff, "whereby they bail.

"do severally acknowledge to owe unto the plaintiff the sum of £20 a piece, to be levied upon their several goods and chattels, lands and tenements, upon condition, that if the defendant be condemned in the said action, he shall pay the condemnation, or render himself a prisoner to the fleet for the same; and if he fail so to do, they undertake to do it for him."

R. 5 W. & M.

But if the defendant be present, then he likewise enters into recognizance with the bail, which is a great ease to them, because they only become bound with him in the sum sworn to.

Bail in the county.

But if the cognizors live above ten miles from London or Westminster, commissioners are appointed in every county beyond that distance, to prevent the expence of travelling to town, under the Stat. of 4 & 5 W. & M. c. 4. to take such recognizances, and after they are so taken, an affidavit is made by the attorney or his clerk, being present, of the due taking thereof, which, with the bail piece, is transmitted to one of the justices of this court to be allowed, who on reading the same, signs his *allocatur* thereon; they are then taken to the filacer and filed with him, and unless the plaintiff's attorney excepts against them within twenty days, such bail become *absolute*, for before the twenty days are expired, the bail are only *conditional*. R. 5 W. & M.

Exception.

But if the plaintiff or his attorney except against them, then, if they live in London or Westminster, or within ten miles from thence, the bail must appear in open court for that purpose (unless the attorney content otherwise), which if he does, may be done before one of the justices: if they live above ten miles, then they may justify themselves by affidavit sworn before the commissioner who took such recognizance of bail, and which is mostly taken at the same time to prevent trouble and expence.

Assignment of the bail bond.

If the bail to the sheriff be not put in in due time, and they are responsible persons, the plaintiff may take an assignment from the sheriff of the bail bond (under

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(under the Stat. 4 & 5 Ann. c. 16.) and bring an action thereupon against the sheriff's bail. But if the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff, by calling upon him, first, to return the writ (if not already done) and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be put in above, he will himself be responsible to the plaintiff.

Thus much for the process; which is only meant to bring the defendant into court, in order to contest the suit, and abide the determination of the law. When he appears in person as a prisoner, or by attorney, then follow the pleadings between the parties, which are the mutual altercations between them, and at present are set down and delivered to the attornies in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in court, and then minuted down by the prothonotaries.

The first of these is the declaration, *narratio*, or Declaration, *count*, antiently called the *tale*; in which the plaintiff sets forth his cause of complaint at length; being an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of *time* and *place*, when and where the injury was committed.

When the defendant is brought into court, upon a supposed trespass, in order to give the court a jurisdiction, which has been already mentioned, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper, unless he has held him to special bail by a *special ac etiam*, which the plaintiff is then bound to pursue.

In *local* actions, where possession of land is to be recovered, or damages for actual trespasses, or for waste, &c. affecting land; the plaintiff must lay his declaration, or declare his injury to have happened, in the very county and place that it did happen; but in *transitory* actions, for injuries that might have happened any where, as *debt*, *detinue*, *slander*, and the

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the like, the plaintiff may declare in what county he pleases, and then the trial must be in that county in which the declaration is laid; though, if the defendant will make affidavit, that the cause of action, if any, arose not in that, but in another county, the court will direct a change of the *venue*, or *visne*, (that is, the *vicinia* or neighbourhood in which the injury was declared to be done) and will oblige the plaintiff to declare in the proper county. For the Statute 6 Ric. 2. c. 2. having ordered all writs to be laid in their proper counties, this, as the judges conceived, impowered them to change the *venue*, if required, and not insist rigidly on abiding to writ; which practice began in the reign of James the First, 2 Salk. 670.; and this power is discretionally exercised, so as not to cause, but prevent, a defect of justice. Therefore the court will not change the *venue* to any of the four northern counties, previous to the spring circuit; because there the assizes are holden once a year, at the time of the summer circuit: and it will sometimes remove the *venue* from the proper jurisdiction (especially of the narrow and limited kind) upon a suggestion, duly supported, that a fair and impartial trial cannot be had therein.

It is generally usual in actions upon the case, to set forth several cases, by different counts in the same declaration (so that if the plaintiff fails in the proof of one, he may succeed in another); and to conclude with declaring, that the defendant had refused to fulfil any of the agreements, whereby he has received damage to such a value. If he proves the case laid in any one of the counts, though he fails in the rest, he shall recover proportionable damages. The declaration always concludes with these words, "and therefore he brings his suit, &c." By which words suit or *secta*, (*a sequendo*) were antiently understood the witnesses or followers of the plaintiff, *Seld. on Fortesc. c. 21.*, for, in former times, the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made

out

out at least a probable case. *Braet. 400. Fl. b. 2. c. 6.*

If the plaintiff neglects to deliver a declaration at the end of the ensuing term after the process is returnable, and the defendant having entered his appearance with the proper officer as of that term in which the process is returnable, and given a rule to declare in the proper office, and demanded a declaration, the defendant may, any time in the vacation of such ensuing term, after the rule for declaring is out, sign his nonpross, and if he be guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged not to follow his remedy as he ought to do; and thereupon he is also said to be nonprossed. And for thus deserting his complaint, after making a false claim, he shall not only pay costs to the defendant, but is liable to be amerced to the king. *Vide R. H. 9 Ann. f. 3.*

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant, within the time allowed him by the rules of the court, to make his defence, and to put in a plea; or else the plaintiff will at once recover judgment by default, or *nihil dicit* of the defendant; because, having deserted the court, he ceases to oppose the plaintiff's demand, and so submits that judgment be given against him. But before the defendant makes his defence, he may crave oyer, in writing of the bond or other specialty upon which the action is brought; that is, to hear it read to him; the generality of defendants, in the times of ancient simplicity, being supposed incapable to read it themselves; whereupon the plaintiff's attorney delivers a copy thereof, to enable the defendant to plead such plea as his counsel thinks proper. *Barnes 327. R. M. 1 Geo. 2.* But the court never makes any rules for oyer of originals, which are matters of record. *Barnes, qu. Ed. 340.*

If the plaintiff does not deliver his declaration in due time, the defendant is intitled to an *imparlance*,

or *licentia loquendi*, which seems to have arisen from a notion of religion mentioned in *Saint Matthew, ch. v. v. 25.* in obedience to that precept of the gospel, “agree with thine adversary quickly, whilst thou art in the way with him.” They looked upon the plaintiff, at the time of declaring, to be in his way towards judgment; and therefore, since the defendant was ordered by the precepts of religion to agree with him, that there was a necessity to give time for that purpose; this imparlance was entered when the writ was general, because the defendant did not know how to agree with the plaintiff till he had heard his full demand; and therefore then the defendant might have agreed with him in the country whilst he was in the way, according to the letter of the text, in which case there was no need of a *libertas loquendi* to be entered upon the roll. *Gilb. C. P. 42. 3.*

Imparlances are either *general* or *special*; *general* are granted of course, because the plaintiff has not proceeded in due time by delivering his declaration; *special*, with a saving of all *exceptions* to the writ or count, which may be granted by the prothonotary; or they may be granted still more *special*, with a saving of all exceptions whatsoever, which is granted at the discretion of the court. 12 *Mod.* 529.

Defence.

Defence, in its true legal sense, denotes an opposing or denial of the truth or validity of the complaint, answering to the *contestatio litis* of the civilians. It is a general assertion which the defendant makes immediately after the count or declaration, that the plaintiff hath no ground of action; which assertion is afterwards extended and maintained in his plea. And formerly the courts were very nice and curious with respect to the nature of the defence, so that if no defence was made, though a sufficient plea was pleaded, the plaintiff should recover judgment, *Co. Lit.* 127.; for a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the competency

tency of the plaintiff, and the cognizance of the court were allowed. By defending the *force and injury*, the defendant waived all pleas of *misnomer* by defending the damages, "*all exceptions to the person of the plaintiff*," and by defending either one or the other "*when and where it should behove him*," he acknowledged the jurisdiction of the court. But of late years these niceties have been very deservedly discountenanced. *Salk.* 217.

Pleas are of two sorts; *dilatory pleas*, and *pleas to the action*. *Dilatory pleas* are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury. *Pleas to the action* are such as dispute the very cause of suit.

Dilatory pleas are, 1. *To the jurisdiction of the court*: alledging, that it ought not to hold plea of the injury, it arising in *Wales*, or *beyond sea*; or because the land in question is of *ancient demesne*, and ought only to be demanded in the lords court, &c. 2. *To the disability of the plaintiff*, by reason whereof he is incapable to commence or continue the suit; as, that he is an *alien enemy outlawed*, *excommunicated*, *attainted of treason or felony*, under a *præmunire*, not in *rerum u terra* (being only a fictitious person), an *infant*, *feme covert*, or a *monk professed*. 3. In *abatement*: which is either of the *writ* or the *count*, for some defect in one of them; as by misnaming the defendant, which is called a *misnomer*; or other want of form in any material respect. Or, that it may be, that the plaintiff is dead; for the death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as *trespass*, *battery*, and *slander*, the rule is, that *actio personalis moritur cum persona*, 4 *Inst.* 315.; and it shall never be revived either by or against the executors or other representatives. *ibid.* *Cowper's Rep.* 375. The defendant, generally speaking, can have but one plea in abatement, and this is the natural order of pleading; because, by the

order before mentioned, each subsequent plea admits the former ; as when he pleads to the person of the plaintiff, he admits the jurisdiction of the court ; for it would be nugatory to plead any thing in that court that has no jurisdiction in the case. When he pleads to the count, he allows that the plaintiff is able to come into that court to implead him, and he may there be properly impleaded ; but in pleading to the count, he does not admit the writ to be good ; yet if the count be vicious, the writ is consequently destroyed ; for though the writ in itself may be good, yet it is not pursued : but in pleading to the writ, he admits to the form of the count, because by any objections to the form of the writ, he allows the count to be sufficient in form ; if the writ be good, it is not to any purpose to object to the form of such writ, if the form of the count be thereupon insufficient ; but if the count be in substance variant, the defendant may shew it any time in arrest of judgment, because the court has no authority to proceed in a matter of substance different from the original.

If a man pleads to the action of the writ, he allows both the form of the count, and the writ ; for if he admits that the form of the writ and count were adapted to the plaintiff's case, that such form is good and sufficient, since to object to the action not being applicable to the plaintiff's case, does admit, that if it be ruled by the count, it does allow that the plaintiff has before the court a count in form sufficient.

These pleas to the jurisdiction, to the disability, or in abatement, were formerly often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay ; but now by *Stat. 4 and 5 Ann. c. 16.* "*No dilatory plea is to be admitted, without affidavit made of the truth thereof, or some probable matter shewn to the court to induce them to believe it true.*" And it is a rule, that no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better ; that is, shew him how it might be amended, that

that there may not be two objections upon the same account. *Brownl.* 1, 94

When these pleas are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ by leave of the court, or to amend and new frame his declaration. But when, on the other hand, they are over-ruled as frivolous, the defendant has judgment of *respondat ouster*, or to *answer over* in some better manner. It is then incumbent on him to plead a plea in bar to the action, by which he admits the form of the writ and count; for he answers to the right in demand, and puts that right in issue, and thereby admits that there is a sufficient form to put the right in issue; and therefore, tho' a man pleads *non assumpsit modo et forma*, yet the *modo et forma* does not traverse the form of the writ or count, but the substance of the promise only; which is the true reason why you may give another promise in evidence, different in time and place from that mentioned in the declaration, tho' not different in substance.

The general issues are contrived in such words as General issue. are proper to deny the whole fact in the declaration; without offering any special matter to evade it. Thus, if a charge is of trespass, the general issue is, *not guilty*; if with a debt, that *he owes nothing*; if on a specialty, as a bond, or other deed, *non est factum*, or *that it is not his deed*; for the debt being grounded on a specialty, he admits the debt, unless he denies the deed, for the seal continuing, it must be dissolved *eo ligamine quo ligatur*; for there is that credit given to the solemnity of the seal, that the defendant cannot say he did not owe, when it appeared by the acknowledgment of the seal that he was indebted; on an *assumpsit*, *non assumpsit*. And these pleas are called the *general issue*, because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue; by which is meant a fact assumed on one side, and denied on the other. There is also a plea to the ac-

tion, whereby the defendant confesses or acknowledges the debt to be due; and that is, where the creditor harrasses him with an action, after tender and refusal of the debt; in this case, it becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding, "*that he has always been ready, and still is ready, to discharge it*": for a tender by the debtor, and refusal by the creditor, will in all cases discharge the costs, 1 *Vent.* 21.; but not the debt itself, the defendant being obliged to pay the sum tendered into the hands of the prothonotary of the court, which, if the plaintiff accepts, he is estopp'd going any farther on that plea, but may go for further damages upon the general issue, which is always pleaded with the tender. *L. Raym.* 774.

Payment of money into court.

Frequently the defendant confesses one part of the complaint (by *cognovit actionem* in respect thereof), and traverses or denies the rest; in order to avoid the expence of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the payment of money into court, being as much as the defendant acknowledges to be due, together with the costs incurred, in order to prevent the expence of any farther proceedings; and this may be done in all actions where the demand is of a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury; and if the plaintiff accepts thereof, he is to be paid his costs, if not, he proceeds at his peril; for if he does not prove more to be due than is so paid into court, he will be nonsuited, and pay the defendant costs; but he is intitled to the money so paid in at all events, for the defendant has acknowledged it to be his due.

Set off.

If the plaintiff owes to the defendant a sum of money, as for goods sold and delivered, or the like, he may set up that demand against the plaintiff by plea, or notice of set-off, pursuant to the *Stat. of 2 Geo. 2. c. 22. and 8 of Geo. 2. c. 24.* but if the defendant's demand should not be equal to counter-balance

balance the plaintiff's, then before he gives notice of such set-off, he must pay the remaining balance into court.

Formerly the general issue was seldom pleaded (except when the party meant wholly to deny the charge alleged against him); but when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special plea*, which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence which cannot be thus specially pleaded, may be given in evidence upon the general issue at the trial. But the science of special pleading having been perverted to the purposes of *chicanery* and *delay*, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have always allowed special matter to be given in evidence at the trial.

Special pleas, in bar of the plaintiff's demand are *Special pleas*. very various, according to the circumstances of the defendant's case: as in real actions, *a general release*, or *a fine*, both of which may destroy and bar the plaintiff's title. Or in personal actions, *an accord*, *arbitration*, *conditions performed*, *non-age of the defendant*, or some other fact which precludes the plaintiff from his action.

A justification is likewise a special plea in bar, as in Justification. actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of, *in right of some office which warranted him so to do*; or in action of slander, *that the plaintiff is really as bad a man as the defendant said he was*.

Also a man may plead the statute of limitations in bar; or *the time limited by certain acts of parliament*, beyond which no plaintiff can lay his cause

Statute of limitations.

of action; the use of which were calculated to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for any injury committed at any distance of time. If therefore, in any suit, the injury or cause of action happened earlier than the period expressly limited by law, the defendant may plead the statute of limitations in bar. *Vide Limitation of actions.*

Estoppel.

An *estoppel* is likewise a special plea in bar; which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary.

There are three kinds of estoppels.——: 1st. *By matter of record.* 2^d. *By matter in writing*, as by deed indented, &c. 3^d. *By matter in pais*, as by livery, by entry, by acceptance of rent, partition, by acceptance of an estate.

By matter of record all parties are estopped, so that a man shall not be received to take an averment contrary to a record. *Co. Lit.* 357. a.

In a deed all the parties are estopped to say any thing against it; it estops a lessee to say, that the lessor had nothing in the land, &c. and parties and privies are bound by estoppel. *Co. Lit.* 58.

If the condition of an obligation be to perform all covenants contained in such an indenture, in debt upon the obligation, the defendant cannot say that there is no such an indenture, because he is estopped. *Roll. Abr.* 408. *Cro. Eliz.* 767. *Sand.* 316.

If one gives an acquittance under his hand and seal for rent due at a day, he shall be estopped thereby to demand the rent due at a day before. *Lev.* 43. *Sid.* 24. 3 *Co.* 65. But if not under his hand and seal, it is no estoppel, but evidence only. *Comb.* 59.

If a tenant for years (who hath no freehold) levies a fine to another person, though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for if he afterwards brings an action to recover those lands, and his fine is pleaded against him,

him, he shall thereby be estopped from saying that he had no freehold at the time, and therefore was incapable of levying it. 3 *Black. Com.* 308.

An estoppel ought to be *certain* and *affirmative*, and a matter alleged that is not traversable, shall not estop; one may not be estopped by acceptance, before his title accrued. An estoppel must be insisted and relied on; and where there is estoppel against estoppel, it puts the matter at large. *Co. Lit.* 532. *Hob.* 207.

Regularly a stranger shall not be bound by, nor take an advantage of an estoppel. *Co. Litt.* 352. a.

Estoppels are to be pleaded relying on the estoppel, without demanding judgment, *si actio*, &c. 4 *Rep.* 53.

The conditions and qualities of a plea (which as ^{Qualities of a} well as estoppels, will hold equally, *mutatis mutandis*, ^{plea.} with regard to other points of pleading), are, 1st. *That it be single, and containing only one matter*; for duplicity begets confusion. But by *Stat.* 4 and 5 *Ann. c.* 16. a man, with leave of the court, may plead two or more distinct matters or single pleas; as in assault, *not guilty*, and *son assault demesne*. 2. *That it be direct, and not by way of argument or rehearsal*. 3. *That it have convenient certainty of time, place, and persons*. 4. *That it answer the plaintiff's allegations in every material point*. 5. *That it be so pleaded as to be capable of trial*; for without trial, the cause can receive no end. *Co. Lit.* 303. b.

The plea ought to be according to the demand, and, as the plaintiff's action must have all essentials necessary to maintain it, so the defendant's bar must be substantially good; that is, the essence or gist of the plea must be such, as if found for the defendant, the court, according to the rules of law, must dismiss or give judgment for him; but if the gist of the bar be nought, it cannot be cured even after verdict found for him; if it be had only in form, a verdict will cure it; and if the gist be traversed, all collateral circumstances will be intended after verdict. 4 *Bac. Ab.* 86. and in general pleading, prolixity

prolixity is to be avoided. As in pleading an *outlawry*, the *maine* process is not to be repeated; also, in pleading a general statute, the statute is not to be recited. If a man is bound to perform all the covenants in an indenture, if they are all in the affirmative, he may plead performance thereof generally, and is not obliged to exhibit to the court a performance of each of them; which would overload the proceedings with a recital of all the covenants, whereas one only might be in controversy between the parties. *Co. Lit.* 303. *Leon.* 136. 2 *Vent.* 156. 4 *Bacon Abr.* 91. *R. M.* 1654. *sect.* 15.

But if some of the covenants are in the negative, the defendant must plead it specially; for a negative cannot be performed, otherwise on a special demurrer the plea would be bad; *aliter* on a general demurrer. *Co. Lit.* 303. *Moor* 856. *Cro. Eliz.* 691. *Sid.* 87. But if the negative covenants are all void and against law, and the affirmative good and lawful, he may plead performance generally, and the court shall take notice, that the negative covenants are void and against law. *Moor* 850. *Godb.* 212. *Hob.* 12.

Special pleas are usually in the affirmative, sometimes in the negative; but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form;—"and this he is ready to verify."

It is a rule in general pleading, that no man be allowed to plead specially such a plea as amounts to the general issue; for pleas which amount to the general issue are only facts on which the issue may be turned in evidence, and therefore are not issues of fact to be referred to the court, but matters of evidence to be determined by a jury, and consequently not good pleas; because they draw to the examination of the court what is proper to be determined by a jury: and such pleas are good causes of special demurrer, since 27 *Eliz. c. 5.* and before it, of a general one. 10 *Co.* 95. *a.* *Cro. Car.* 157.

If

If the defence consists in matter of law, the defendant must plead specially; for the matter of law must be shewn to the court, so as the judges may determine, whether the discharge will bar the plaintiff's action or not; and therefore, on not guilty in trespass, the defendant cannot shew a licence to prove there was no trespass; because, though the licence makes it no trespass, yet he shews that licence to an improper jurisdiction, viz. to the jury, who are not proper judges of the law. 3 *Mod.* 166. 5 *Mod.* 252. 2 *Salk.* 580. *pl.* 1. *Hob.* 174. So if a defendant shews a release of a debt to a jury, it is no evidence, because, though the release makes it to be no debt, he shews it to an improper jurisdiction.

When the plea of the defendant is filed, if it does not amount to an issue, or total contradiction of the declaration, but only evades it, the plaintiff may reply to it: either traversing it, that is, totally denying it; or he may alledge new matter in contradiction to the plea.

Replication, (*replicatio*) is an exception or answer Replication, made by the plaintiff to the defendant's plea, and it is to contain certainty, not varying from the declaration, but must pursue and maintain the cause of the plaintiff's action, otherwise it will be a departure in pleading, and go to another matter. *Cp. Lit.* 304. Therefore if the plaintiff in his declaration sets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication shews new matter different from his declaration, this is a departure. *Plow.* 78. 2 *Inst.* 147. But if the defendant takes issue upon it, he loses the advantage, if it's found for the plaintiff; therefore he must demur to it. *Ray.* 86. 1 *Lill. Abr.* 444.

If the defendant plead one thing in bar, and the plaintiff replies to it, the defendant in his rejoinder quits that, and shews another matter contrary to, or not pursuing his first plea; this is a departure and good cause of demurrer. 1 *Salk.* 121.

Traverse

Traverse.

Traverse comes from the French *traverser*, and is used in the law for the denying of some matter of fact, alledged to be done in a declaration; upon which the other side comes and affirms that it was done; and this makes a single and good issue for the cause to proceed to trial: and the formal words are, in our French, *sans ceo*, in Latin, *absque hoc*, and in English, *without that*, that such a thing was done or not. *Kitch. 217. West. Symb. par. 2.* Every matter of fact alledged by the plaintiff, may be traversed by the defendant, but not matter of law, or where it is part matter of law, and part matter of fact; nor may a record be traversed which is not to be tried by a jury.

These rules are to be observed in traverses:

1. The traverse of a thing not immediately alledged vitiates a good bar.
2. Nothing must be traversed, but what is expressly alledged.
3. Surplusage in a plea doth not inforce a traverse.
4. It must always be made to the substantial part of the title.
5. Where an act may indifferently be intended at one day or another, there the day is not traversable.
6. In actions of trespass, generally the day is not material; though if a matter be to be done upon a particular day, there it is material and traversable. *2 Roll. Rep. 3. 1 Roll. Rep. 235. Felt. 121. 2 Lill. Ab. 313.* If the parties have agreed on the day for a thing to be done, the traverse of the day is material; but where they are not agreed on the day, it is otherwise; and though it is proved to be done on another, it is sufficient. *Palm 280.*

Where the matter alledged by the defendant in his plea, is contrary to the matter set forth in his declaration, there must be a traverse or denial of such matter set forth in the declaration; so if the replication contradicts the matter alledged in the plea. *Lutw 381. Cro Eliz 30.*

There cannot be a traverse upon a traverse, because that in all pleadings, whercupon a traverse is properly taken, the issue is closed; and therefore

a traverse

a traverse cannot be taken on a traverse, for a traverse must be of a material point; if to the declaration it destroys the plaintiff's action; if to the bar, it destroys what is said in avoidance of the action; and if to the replication, what was said in avoidance to the bar, *et sic de cæteris*, and consequently a subsequent traverse will be insignificant; because when a material traverse is taken the rest stands confessed. *Co. Lit.* 282. *Hob* 104. *Sand.* 20. 22. *Vaugh.* 62. *Cro. Car.* 105. *Salk.* 91.

That the traverse must be taken to some material point alledged by the adverse party, which if found for him who takes it, absolutely destroys the adverse party's right, by shewing, that he hath none, in manner and form as he hath alledged; and being to the principal point alledged, puts an end to the matter. *2 Saund.* 5. 28. *6 Co.* 24. *a. Carter* 217. *Lane* 18.

The replication may confess and avoid the plea by some new matter of distinction, consistent with the plaintiff's former declaration, as in an action for trespassing on land, whereof the plaintiff is seized; if the defendant shews a title to the land by descent, and that therefore he had a right to enter, and give colour to the plaintiff, the plaintiff may either traverse or totally deny the fact of the descent; or he may confess or avoid it, by replying, "That true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life."

Colour (color), signifies a probable plea, but what is in fact false; and hath this end, to draw the trial of the cause from the jury to the judges: and therefore colour ought to be matter in law, or doubtful to the jury.

The replication, where new matter is offered, concludes with *hoc paratus est verificare*, so as to give the defendant an opportunity to rejoin; but if the plaintiff takes issue on the defendant's plea, and it be a matter to be tried by a jury, then it concludes to the country.

But

Rejoinder.

But if there is new matter in the replication, the defendant may rejoin, or put in his answer, called a rejoinder (*rejunctio*), which is to be a sufficient answer to the replication, and follow and enforce the matter of the bar pleaded : and if the defendant depart therefrom, the rejoinder is not good. 2 *Lill. Abr.* 433.

Departure in pleading is when the second plea contains matter not pursuant to the former, and which does not fortify the same; and when the rejoinder contains new matter subsequent to the matter, or not fortifying the same, this is regularly a departure. *Co. Lit.* 301. But where a man pleads any thing which he could not have shewed at first, it shall never be reckoned a departure; so where he fortifies it in the same manner that he pleaded it; but if he fortifies in another manner, as by especial custom, it will be a departure. *Yelv.* 14. *Dyer* 253. *Stile* 260. *Jon.* 262. *Leon.* 150. *Cro. Car.* 257. The plaintiff may answer this by way of surrejoinder (*quadruplicatio*), upon which the defendant may rebutt; and the plaintiff may answer him by a sur-rebutter.

It is very seldom the pleadings run to such a length, unless in actions of trespass; there the plaintiff, after he has alledged in the declaration a general wrong, may, in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a new or *novel assignment*. As if the plaintiff in trespass declares on a breach of his close in D; and the defendant pleads that the place where the injury is said to have happened, is a certain place of pasture in D, which descended to him from B his father, and so is his own freehold; the plaintiff may reply and assign another close in D, specifying the abutments and boundaries, as the real place of the injury;

jury; which in fact amounts to a new declaration, to which the defendant may justify, by alledging new matter; and frequently such justifications lead the parties into those great length of pleadings before they join issue.

They are sometimes met with in replevin; but mostly before they come to a rebutter, there is a demurrer, which brings the matter of law to an issue before the court.

It hath been previously observed, that duplicity of pleading must be avoided. Every plea must be simple, intire, connected, and confined to a single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute; for this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expence of the parties; yet it is frequently expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. And this may be done by protestation, whereby the party interposes an oblique allegation or denial of some fact; *protesting* that such a matter does or does not exist; and at the same time avoiding a direct affirmation or denial, *Co. Lit.* 124. *b.* and it must come after *precludi non*, and not before in law. *Com.* 216. *b.* The use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which, yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, if a defendant, by way of inducement to the point of his defence, alledges (among other matters) a particular mode of seisin or tenure, which the plaintiff is unwilling to admit, and yet desires to take issue on the principal point of the defence; he must deny the seisin or tenure by way of protestation, and then traverse the defensive

defensive matter: So if an award be set forth by the plaintiff, and he can assign a breach in one part of it. *viz.* the nonpayment of a sum of money, and yet is afraid to admit the performance of the rest of the award, to aver in general a nonperformance of any part of it, lest something should appear to have been performed; he may, to save himself any advantage he might hereafter make of the general nonperformance, by alledging that by protestation; and plead only the nonpayment of the money. *Co. Lit.* 126 *Reg. Plac.* 70. 18. *Vin. Ab. Title Protestation.*

In any stage of the pleadings, when either side advances or affirms any new matter, he usually (as has been said) avers it to be true; on the other hand, when either side traverses or denies the facts pleaded, he usually tenders an issue; the language of which is different according to the party by whom the issue is tendered: for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "*and of this he puts himself upon the country,*" thereby submitting himself to the judgment of his peers: but if the traverse lies upon the plaintiff, he tenders the issue, or prays the judgment of his peers against the defendant thus, "*and this he prays may be enquired of by the country.*"

But if either side (as for instance) the defendant pleads a special negative plea, not traversing or denying any thing that was before alledged, but disclosing some new negative matter; as where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made out, he tenders no issue upon this plea; because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when, in the course of pleading, they come to a point which is affirmed on one side,

and denied on the other, they are then said to be at issue; and all their debates being at last contracted into a single point, must now be determined either in favour of the plaintiff or defendant.

Issue (*exitus*, from the *French* *issuer*, i. e. *emanare*) generally signifies the point of matter issuing out of the allegations and pleas of the plaintiff and defendant, consisting regularly upon an *affirmative* and *negative* to be tried by twelve men. 1 *Inst.* 126. 11. *Rep.* 10.

But there is likewise an issue upon the matter of law, that is, where there is a demurrer to the declaration, plea, replication, &c. and a joinder thereto, which is to be determined by the judges. 1. *Inst.* 71, 72.

Demurrer, cometh of the Latin word *demorari*, to abide; therefore he who demurs in law is said to abide upon the point in question, for it confesses the facts to be true, as stated by the opposite party; as if the matter of the plaintiff's complaint be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration: if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger's right; here the plaintiff may demur in law to the plea; and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.

Demurrers are *general* or *special*; *general*, where no particular cause is alledged; *special*, where the particular objection is pointed out, and insisted upon as the cause of demurrer; and that as a general demurrer confesseth all such matters of fact as are sufficiently pleaded, so he that demurs specially, can take no advantage of any other matter of form than what is expressed therein; but he may of any other matter of substance. *Co. Lit.* 72. a. 10 *Co.* 88. Matters of substance, that is, the omission of such material things as are necessary to shew a right in the plaintiff,

plaintiff, or material for the defendant in his plea, may be taken advantage of on a general demurrer; but matter of *form merely*, must be specially alleged, and assigned as causes of demurrer. *Stat. 27 Eliz. c. 5. Stat. 1. 10 Co. 88. Dist. plac. 118. 2 Ld Ray. 798. 2 Salk. 678. pl. 5. Stat. 4 S. 5 Ann. c. 16.*

The form of such demurrer is, "by averring the declaration or plea, replication or rejoinder, to be insufficient in law to maintain the action or defence; and therefore praying judgment for want of sufficient matter alleged." And upon either a *general* or *special* demurrer, the opposite party "avers it to be sufficient," which is called a *joinder in demurrer*, and then the parties are at issue in point of law. *Co. Lit. 72. a.*

It may not be improper to observe, that during the whole of these proceedings, *viz.* from the delivery of the declaration, it is necessary that both the parties be kept or continued in court from day to day, until the final determination of the suit. For the court can determine nothing, unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after appearance, and a time prefixed for their appearance in court again: therefore, in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the time allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be *nonest*, or not to follow and pursue his complaint, and shall lose the benefit of his writ; or if it be on the side of the defendant, judgment must be against him, for such his default. And as well before issue or demurrer joined, as after, a day is continually given and entered upon the record, for the parties to appear from time to time, as the exigence of the case may require. The giving of this day is called the *continuance*, because thereby the proceedings are continued, without interruption, from one adjournment to another. If these continuances are omitted, the
cause

cause is thereby discontinued, and the defendant is discharged *fine die*, without day, for this term: for by his appearance in court he has obeyed the command of the king's writ, and unless he be adjourned over to a day certain, he is no longer bound to attend that summons; but he must be warned afresh, and the whole must begin *de novo*.

It has been already said, that demurrers are to be determined by the judges of the court, upon solemn argument by counsel on both sides; and to that end a demurrer book is made up by the attorney in this court, who is to support the demurrer, containing all the proceedings at length, which are afterwards entered on record, and delivered to the secondary in court; a brief is then given to a serjeant to move for a *cessation* (*discessum*) a day to hear the counsel on both sides, which is granted by the court on the reading of the record; the rule is then drawn up for that purpose, and the cause entered, copies of the demurrer book are then made and delivered to each judge to peruse, one week at least before the day appointed for the argument by the plaintiff's attorney, two of which are to be paid for by the attorney for the defendant two days before the argument, or he is not to be heard, *R. E. 27. m. 2. R. M. 6 Geo. 2.* on the day appointed; the serjeants on each side argue the demurrer, which is then determined by the court, and judgment is thereupon accordingly given. If the action be in debt, and judgment is given for the plaintiff, the judgment is final; but if in case a writ of inquiry of damages must be awarded, before the plaintiff can have final judgment. If judgment be for the defendant, the judgment is, that the plaintiff "*nihil capiat per breve*," take nothing by his writ, and that the defendant "*eat fine die*," go without day. *Wood's Ins.* 603. Thus is an issue in law or demurrer disposed of.

An issue of fact is where the fact only, and not the law, is disputed: and when he that denies or traverses the fact pleaded by his antagonist has ten-

dered the issue, thus, "*and this he prays may be enquired of by the country,*" or, "*and of this he puts himself on the country,*" it may immediately be subjoined by the other party; "*and the said A. B. doth the like;*" which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause on the truth of the fact in question to the determination of a jury.

It may sometimes happen, that after the defendant has pleaded, may even after issue or demurrer joined, there may have arisen some new matter, which is proper for the defendant to plead; as, that the plaintiff, being a *feme sole*, is since married, or that she has given the defendant a release, and the like; here, if the defendant takes advantage of this new matter as early as he possibly can, *viz.* at the day given for his next appearance, he is permitted to plead it, and is called a plea, *quis darrein continuance*, or since the last adjournment: for it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former: it is dangerous to rely on such a plea, without due consideration: for it confesses the matter which was before in dispute between the parties, *Ch. Ez. 49.*; and it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter, and the pleading of it; for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea: but it is not allowed after a demurrer is determined, *verbi gratia*; because then relief may be had in another way, namely, by writ of *audita querela*, which is in the nature of a bill in equity, to be relief against the oppression of the plaintiff. This writ is now almost rendered useless, since the courts have shewn so much indulgence in granting a summary relief upon motion. *Ld. Raym. 439.*

When the parties are at issue, as before mentioned, the court awards a writ of *scire facias* upon the roll, commanding the sheriff "*that he cause to come before*"
 " *the*

“ the king’s justices at Westminster (on such a day)
 “ twelve free and lawful men of the body of the county,
 “ by whom the truth of the matter may be better known,
 “ and who are neither of kin to the plaintiff or defend-
 “ ent, to recognize the truth of the issue between the
 “ parties.” The jury is not summoned upon this writ, and therefore not appearing at the day, must unavoidably make default, and a compulsive process is now awarded on the Roll against the jurors, called a *habeas corpora juratorum*, commanding the sheriff
 “ to have the bodies of the jurors, that they appear at
 “ Westminster upon (the next return day after the
 “ trial) next term, unless before that day the chief
 “ justice shall come into London or Westminster;” (if the venue be laid in London or Westminster) but if the venue be laid in the county, as Oxford, &c. then, “ unless before
 “ that time, viz. on Wednesday the day
 “ of July the justices of our lord the king, appointed to
 “ take the assizes in and for the said county, shall first
 “ come at Oxford, &c.” (the place where the assizes are usually holden.)

These writs of venire, and *habeas corpora juratorum*, are usually sued out together; and if the cause is to be tried in London or Middlesex, the venire is made returnable the first return of that term wherein the issue is joined, and the *habeas corpora* the next return day after the day of trial; as, for instance, if the cause is to be tried the last sitting within the term, then if the general return happens after that day, that is, the proper return day for it: if after term, the first general return day of the next term: if it is a country cause, the venire is made returnable on the last general return of the same term wherein the issue is joined, viz. Hilary or Trinity terms; which from the making up the issue therein, are usually called issuable terms, and the *habeas corpora* on the first general return of Easter; they are taken to the sheriff of the county where the venue is laid, who returns the names of the jurors in a panel annexed to the writ, (viz.) a little pane, or oblong piece of parchment.

If the sheriff be not an indifferent person, as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury; but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process, when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county named by the court, and sworn; and these two, who are called *elisors*, or *electors*, shall indifferently name the jury, and their return is final. *Fortescue de laud. c. 25.* The clause of *nisi prius* was inserted by *Stat. IV. 2. 13 Ed. 1. c. 30.* then the pleadings on both sides are fairly entered on a piece of parchment stamped, which is called a record of *nisi prius*, and having passed through the proper offices, is delivered to the judge's marshal, with the *habeas corpora juratorum*, and sheriff's return annexed, who enters the cause for trial: on the day appointed the parties attend, and the cause is called on in its due course: the record, or a short account of it, is then handed to the judge, to peruse and observe the pleadings, and see what issues the parties are to maintain and prove, while the jury is called and sworn: the case is then opened, first on the part of the plaintiff, and afterwards for the defendant, by their counsel; and when the evidence is gone through on both sides, the judge, in presence of the parties, the counsel, and all others, sums up the whole to the jurors, with such remarks as he thinks necessary for their direction, and giving them his opinion of law arising upon that evidence; upon which the jury are to consider and return their verdict at the bar, which, when done, is recorded in court by the clerk of the *nisi prius*, and then they are discharged.

If the issue be found either for the plaintiff or defendant, or specially, or if the plaintiff makes default, or is nonsuit, it is entered on the record, and is called a *postea*, which being entered, judgment

ment may be signed thereon, unless ordered by the court to the contrary, for the verdict may be suspended for certain causes by a motion for a new trial, or arrested. 6 *Mud.* 22 *Salk.* 649. Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a special verdict; which is grounded on the *Stat. Westm. 2. 13 Ed. 1. c. 20. fol. 2*; and herein is stated the naked facts as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, "that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant." This is entered at length on the record, and afterwards argued and determined in court.

Another method of finding a species of special verdict is, when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge, on a *special case* stated by the counsel on both sides with regard to a matter of law; which hath the advantage over a special verdict, that it is attended with much less expence, and obtains a much speedier decision, the *poslea* being stayed in the hands of the officer of *nisi prius*, till the question is determined; and the verdict is then entered for the plaintiff or defendant, as the case may happen. But as nothing appears upon record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law, which makes it a thing to be wished, that either a method could be devised of either lessening the expence of special verdicts, or else of entering the case at length upon the *poslea*. But in both these cases the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law, and without either special verdict or special case, may find a verdict

absolutely either for the plaintiff or defendant. *Co. Litt.* 386.

But to return to the verdict of the jury, where it is generally found either for the plaintiff or defendant. In this case it has been already observed, that the judgment may be stayed for certain causes, or finally arrested; for it cannot be entered until the next term after trial had, unless the cause be tried within the term; so that if any defect of justice happened at the trial, by surprize, inadvertency, or misconduct, the party may have relief in the court by obtaining a new trial; or if, notwithstanding the fact be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient precision and accuracy, the party may supersede it, by *arresting* or *staying the judgment*.

Causes of suspending the judgment by granting a new trial, are at present wholly extrinsic, arising from matter foreign to, or *dehors*, the record. Of this sort are want of notice of trial, or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury amongst themselves: also, if it appears by the judges report, certified to the court, that the jury have brought in a verdict without, or contrary to evidence, so that he is reasonably dissatisfied therewith, *Bull. nisi prius*, 303-4.; or if they have given exorbitant damages, *Comb.* 357.; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict; for these and other reasons of the like kind, the court will award a second trial. But if two juries agree in the same, or a similar verdict, a third is seldom awarded, 6 *Mod.* 22.; for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.

This mode of granting a new trial, particularly where it could be shewn that the jury had grossly misbehaved

misbehaved themselves, is of a date extremely ancient, and there are instances in the year books of the reigns of *Ed 3. H. 4 & 7.* of judgments being stayed (even after a trial at bar), and new venire awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a jurymen before he was sworn *Brook. Ab. tit. verd. 17. 18. 75.* And upon these Glynn Ch. Just. in 1655. grounded the first precedent that is reported for granting a new trial upon account of excessive damages given by the jury; apprehending with reason, that notorious partiality in the jurors was a principal species of misbehaviour. *Stile 456.* A few years before, a practice took rise in this court of granting new trials upon the mere certificate of the judge (unless fortified by any report of the evidence) that the verdict had passed against his opinion; and at that time was clearly held for law, that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised to the court; lest posterity should wonder why a new venire was awarded, without any sufficient reason appearing upon the record. *Cro. Eliz. 616. Palm. 325. 1 Brownl. 227.* But very early in the reign of Charles the Second, new trials were granted upon affidavits, *1 Sid. 234. 2 Lew. 140.* and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them, the maxim at present adopted being this, “that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another.” *1 Bur. 395.*

The ground for a new trial (if the matter be such as did not, or could not appear to the judge who presided at *nisi prius*) is disclosed to the court by affidavit: if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the

the court give their reasons at large why a new examination ought or ought not to be allowed: the true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

A motion for a new trial cannot be made after the appearance day of the return of the *habeas corpora juratorum*, unless the foundation of the motion be a fact not disclosed to the party till after that time. *Barnes* 443.

Arrest of judgment arises from extrinsic causes, appearing upon the face of the record; as, if the case laid in the declaration is not sufficient, in point of law, to found an action upon, or where the ver-~~dict~~ materially differs from the pleadings and issue thereon; and the rule with regard to arrests of judgment upon matter of law is, "*that whatever is alleged in arrest of judgment, must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea*;" as if, on an action for slander, in calling the plaintiff a *Jew*, the defendant denies the words, and the issue is joined thereon. Now, if a verdict be found for the plaintiff, that the words were actually spoken whereby the fact is established, still the defendant may move in arrest of judgment, that to call a man a *Jew* is not actionable; and if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. Exceptions that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer: or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict, and not suffered, in the last stage of a cause, to unravel the whole proceedings.

Trial by record, is only used in one particular instance: and that is, where a matter of record is pleaded in any action, as a *fine*, a *judgment*, or the like; and the opposite party pleads, "*null tiel record*," that there is no such record existing: upon

upon this, issue is tendered and joined; and here-upon the party pleading the record, has a day given him to produce it, on which day proclamation is made in court for him to "*bring forth the record by him in pleading alledged, or else he shall be condemned;*" and on his failure the plaintiff shall have judgment to recover. The trial of this issue is made by the record; for, as *Sir Edward Coke* observes, a record or enrolment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself. 1. *Inst.* 117. 265. Thus titles of nobility, as whether *earl* or no *earl*, *baron* or no *baron*, shall be tried by the king's writ or patent only, which is matter of record. 6 *Rep.* 53. Also in case of an alien, whether *alien*, *friend*, or *enemy*, shall be tried by the *league* or *treaty* between his *sovereign* and ours; for every league or treaty is of record, 9 *Rep.* 31.; and also, whether a manor be held in *antient demesne*, or not, shall be tried by the record of *Doomsday* in the Exchequer.

If judgment is not arrested or suspended by a new trial, it is then to be entered on the roll or record of the court; and judgments are the sentences of the law, pronounced by the court upon the matter contained in the record, and are of four sorts: *first*, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon demurrer: *secondly*, where the law is admitted by the parties, and the facts disputed, as in case of judgment on a *verdict*: *thirdly*, where both the fact, and the law arising thereon, are admitted by the defendant, which is the case of judgment by *confession* or *default*: or, *lastly*, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *nonsuit* or *retraxit*.

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law; it is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: Against him who hath rode over my corn, I may recover damages by law; but *A* hath rode over my corn, therefore I shall recover damages against *A*. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue in fact; but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and then such the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but "*it is considered,*" *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like: which implies that the judgment is, none of their own; but the act of the law pronounced and declared by the court after due deliberation and enquiry.

All these species of judgments are either *interlocutory* or *final*. Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceedings, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff, upon pleas in abatement of the suit or action, in which it is considered by the court, that the defendant do answer over, *respondeat ouster*; that is, put in a more substantial plea. 2 *Saund.* 30. It is easy to observe, that the judgment here given is not final, but merely interlocutory; for there are afterwards

afterwards farther proceedings to be had, when the defendant hath put in a better answer.

But the interlocutory judgments most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury. This can only happen where the plaintiff recovers; for when judgment is given for the defendant, it is always complete as well as final. And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession, or *cognovit actionem*, when he acknowledges the plaintiff's demand to be just: or by *non sum informatus*, when the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete; and therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some nominee of the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*), in an action of debt to be brought by the creditor against the debtor for the specific sum due: which judgment, when confessed, is absolutely complete and binding; provided the same (as is also required in all other judgments) be regularly docketed, that is, abstracted and entered in a book, according to the directions of the statute of 4 and 5 IV. & M. c. 20. But where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages."

" (24-

“ (indefinitely) ; but because the court know not what
 “ damages the said plaintiff hath sustained, therefore the
 “ sheriff is commanded, that by the oaths of twelve honest
 “ and lawful men, he enquire into the said damages,
 “ and return such inquisition into court ” This process
 is called a writ of enquiry ; in the execution of
 which the sheriff sits as judge, and tries by a jury,
 subject to nearly the same law and conditions as the
 trial by jury at *nisi prius*, what damages the plaintiff
 hath nearly sustained : and when their verdict is
 given, which must assess some damages, the sheriff
 returns the inquisition, which is entered upon the
 roll in manner of a *posita* ; “ and thereupon it is
 “ considered, that the plaintiff receive the exact sum of
 “ the damages so assessed.” In like manner, when a
 demurrer is determined for the plaintiff, upon an ac-
 tion wherein damages are recovered, the judgment is
 also incomplete, without the aid of a writ of en-
 quiry.

Final judgments are such as at once put an end to
 the action, by declaring that the plaintiff has either
 entitled himself, or has not, to recover the remedy
 he sues for. In which case, if the judgment be for
 the plaintiff, “ it is also considered that the defendant
 “ be either amerced, for his wilful delay of justice, in not
 “ immediately obeying the king’s writ, by rendering the
 “ plaintiff his due.” 5 Rep. 24. “ or be taken up, to
 “ pay a fine to the king, in case of any forcible injury.”
 Though now, by Stat. 5 and 6. W. & M. c. 12.
 “ no writ of *capias* shall issue for this fine, but the
 “ plaintiff shall pay 6s. 8d. and be allowed it against
 “ the defendant among his other costs.” And
 therefore in judgment in this court, they enter that
 the fine is remitted, and in the king’s bench they
 take no notice of any fine, or *capias* at all. Salk. 51.
Carth. 390. ; but if judgment be for the defendant,
 “ then it is considered, that the plaintiff, and his
 “ pledges of prosecuting, be (nominal)ly amerced
 “ for his false suit ; and that the defendant may go
 “ without a day, *eat sine die* ; that is, without any
 “ farther continuance or adjournment ; the king’s
 “ writ

“ writ, commanding his attendance, being now
“ fully tried, and his innocence publicly
“ cleared.”

After judgment is entered, execution will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of the proceedings; and then he has his remedy to reverse them by several writs in the nature of appeals, *v.z.* *audita querela*, or *writ of error*. That of attain, being (since the practice of granting new trials) suspended, and there has not been an instance of one in our books for many years. *Vide Cro. Eliz.* 309. *Cro. Jac.* 90.

An *audita querela* is where the defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment; as if the plaintiff hath given him the general release; or, if the defendant hath paid the debt to the plaintiff, without entering satisfaction on the record. In this and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant hath been heard, *audita querela defendantis*, and then setting out the matter of complaint; it at length enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them. It also lies for bail, when judgment is obtained against them by *scire facias*, to answer the debt of their principal; and it happens afterwards that the original judgment against their principal is reversed: nor here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by *audita querela*, which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party has a good defence,
but

Of the Proceedings

but by the ordinary forms of law had no opportunity to make it. 1 *Roll. Abr.* 308 *Finch* 58. *F N B.* 102. But the indulgence now shewn by the courts, in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *quodammodo*, and driven it quite out of practice. *L R* m 439

But if the judgment cannot be arrested, or the party obtain a new trial, execution will follow; unless the party condemned thinks himself unjustly aggrieved by any of the proceedings; and then he has his remedy to reverse the same, by bringing a writ of error but he that brings it must find substantial bail to prosecute the same in many cases, and must bring it in time so as to prevent the plaintiff's proceedings, which must be when he is entitled to sign his judgment. *Stu* 3 *fac.* 1. c 8. 13 *Car* 2. c. 2. 16 and 17 *Car.* 2. c 8

The execution of the judgment is adapted according to the nature of the action, therefore if the plaintiff recover in a real or mixed action, wherein the seisin of the land is awarded to him, the writ is an *habere facias seisinam*, or an *habere facias possessionem*. *Finch* 4, O. Co. Lit 34

Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel) are of five sorts, 1. against the body of the defendant, called a *capias ad satisfaciendum*, or against his goods and chattel, called a *fiat facias*; or against the goods and profits of his lands, called a *levari facias*, or against the goods, and the possession of his lands, called an *elegit*, or against all three, his body, lands, and goods, called an *extent*, or *extendi facias*, but only one of these writs can be issued at one time. 1. *Inq.* 143 Co. Lit 290. *T. Raym* 346.

When the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable hereafter to be harassed a second time on the same account. 2 *Lill. Abr.* 495.

O F T H E

**Judges and Officers of the
Court.**

IT is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person, often heard and determined causes between party and party; but at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of the several courts, which are the grand depository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot alter but by act of parliament. 2 *How. Pl. of the Cr.* 2.

In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated, indeed, but not removeable at pleasure by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power: were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose

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decisions

Of the Judges and

decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative: for which reason, by the statute of 16 *Car. 1. c. 10.* which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council, who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than limiting the provinces of a judge and a minister of state.

His majesty, in the eye of the law, is always present in all his courts; though he cannot personally distribute justice. His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. *Fortesc. c. 8. 2 Inst. 186.*

It is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and jury are kept distinct; that the judges determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England.

The

Officers of the Court.

The judges of this court are at present four in number; one chief justice and three puisne justices, created by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed, and compounded of both; and by Stat. 20 Ed. 3. c. 1. they are to take no fee but of the king; their commissions, in early periods, were *durante bene placito*, afterwards *quamdiu bene se gesserint*, 13 W. 3. c. 2, with a power to remove them on the address of both houses of parliament; but now they are to continue in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secure to them during the continuance of their commissions, 1 Geo. 3. c. 23. This act was made at the earnest recommendation of the king himself from the throne, declaring, "*that he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown.*" Com. Journ. 3 Mar. 1761.

By Stat. 12 & 13 W. 3. c. 2. Stat. 13. Salaries.
 " the salaries of the judges were ascertained
 " and established; during which reign, and
 " until the accession of his present majesty's
 " great grandfather, George I. the salaries
 " of all the judges (the chief as well as the
 " puisne), were equal, viz. 1800*l.* a year,
 " upon whose accession they were increased

Of the Judges and

“ by distinct patents, from those by which
 “ they were appointed judges, viz. The sa-
 “ lary of the chief justice of this court to
 “ double his former salary, and thole of the
 “ rest of the judges, to half as much again
 “ as their former salaries.”

By *Stat. 32 Geo. 2. c. 35. sect. 18.* “ the
 “ salary of every of the puisne judges is aug-
 “ mented 500*l.*”

By *Stat. 1 Geo. 3. c. 23. sect. 3.* “ the
 “ salaries of the judges are payable out of
 “ the annual sum granted for the support of
 “ his majesty’s household, and the honour
 “ and dignity of his crown. And by *sect. 4.*
 “ they are, after the demise of his majesty,
 “ to be charged upon and paid out of the
 “ duties granted for the use of his majesty’s
 “ civil government; and until the making
 “ such provision, and securing the continu-
 “ ance thereof, such salaries shall be paid
 “ out of the monies applicable to the said
 “ uses and expences.” By *19 Geo. 3. c. 65.*
 “ the salaries of the puisne judges are in-
 “ creased to 400*l.* each.” The salaries now
 are; the lord chief justice 3500*l.* per annum,
 the puisne judges 2400*l.* each per annum.

The present judges are, *Alexander Lord Trougherough*, chief justice; *Sir Henry Gould*, Knt.; *Sir George Nares*, Knt. and *John Heath*, Esq.

A judge at his creation takes an oath,
 “ That he will serve the king, and indifferently
 “ administer justice to all men, without respect of
 “ persons, take no bribe, give no counsel where he
 “ is party, nor deny right to any, though the king
 “ by his letters, or by express words, command
 “ the

Officers of the Court.

"the contrary," &c. and he is answerable in body, land, and goods. 18 Edw. 3. c. 4.

Officers of the Court.

THE *custos brevium* is the first or principal officer of this court, and holds his place by the king's letters patent; the present patentees are *John Browning*, Sir *Robert Eden*, Baronet, *Frederick Young*, and *Edward Gore*, Esquires, who execute the said office by *John Walton*, Esquire, their deputy.

There are three *prothonotaries* of this court, who hold their offices for life, and are admitted by the chief justice of the court for the time being. But the second *prothonotary* is admitted on the nomination of the *custos brevium*, who, in right of his office, has that appointment. The present *prothonotaries* are *William Mainwaring*, *Henry Earl*, *Anthony Dickins*, Esquires. Their office N^o 2, in *Tanfield Court*, Inner Temple.

In term time, they attend the sitting of the court at *Westminster*, for the dispatch of such matters as arise from causes entered in the office, and to inform the court of the state of such causes, and certify to them in matters of practice when required. One *prothonotary* attends every day in term (except the first and last days) at their office, in the forenoon from eleven to one, and all attend in the afternoon from six to eight.

There are three *secondaries* in this court; one belonging to each *prothonotary*, who has

Officers of the Court.

Duty.

the nomination and appointment of such secondary. The present secondaries are, *Henry Fothergill*, *Alexander Gerrard*, and *William Skin*, Esquires. In term time they attend the court and judges in the treasury, to read all the records, writings, affidavits, petitions, papers, and exhibits; take minutes of all rules and orders, and draw up the same, and take recognizances in court; have the custody of the court books, in which are entered the names of all causes on demurrer, special verdicts, and other matters that are to be argued in court, and of causes that are to be tried at bar; enter all commitments of prisoners, discontinuances, and satisfactions acknowledged upon record, and amend records by order of the court, &c.; attend trials at bar, &c.

Clerks of the judgments.

Clerk of the judgments, *Mr. Rowland Lickbarrow*; he draws up all final judgments after inquisitions taken, verdicts obtained, or confutes had at *nisi prius*, and on demurrers, and issues joined upon *nul tiel record*; draws up and enters all continuances necessary; draws up the award of writs of *eligis* and *partition*, enters the same with the return thereof upon the roll; enters all satisfaction upon judgments, when the same is done by order of a judge, and not in open court; and exemplifies any of the above mentioned judgments, if applied for within a year after the signings of such judgments.

Clerk of the dockets.

Clerk of the dockets and declarations, *Mr. Samuel Underwood*. He enters upon remembrance all appearances to writs of attachments of privilege, writs of *seire facias*, &c.;

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&c. filed with the prothonotaries, prepares bail pieces or recognizances to attachments of privilege, *habeas corpus's*, and otherailable writs issuing out of the prothonotary's office; attends the court, or a judge, when such recognizances are taken, and when such bails are justified, or additional bail is put in; and also, when the defendant surrenders himself in discharge of such bail: makes copies of all special juries, certificates of declarations not being filed against prisoners; and also certificates of writs of *recordari*, and writs of *false judgment*, not being filed according to the course and practice of the court. And, as clerk to the prothonotaries, makes out copies of all the special verdicts for the judges, and attornies concerned therein, &c.

Clerk of the reversals, Mr. Rowland Lickbarrow; he is jointly and verbally appointed by the three prothonotaries, draws up and enters the *præcipe's* thereof on remembrances, and draws up certificates thereof to the outlawry office; draws up and engrosses the bail pieces, or recognizances, in order to such reversals, and attends therewith; and makes out the *superfedeas* when necessary. Clerk of the reversals. Duty.

Clerk of the treasury, Mr. Thomas Jefferies; Clerk of the he is appointed, by parole, from the lord chief justice. treasury.

Henry Brougham is clerk of the jurats, or Clerk of the one of the under clerks of the treasury, for all the counties in England; and is admitted by the lord chief justice of the court; and holds his place for life.

Mr. George Stubbs is the treasury-keeper, and Treasury keeper.

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and holds his place also by parole appointment of the lord chief justice.

Filacer or Filazer (*filizarius*, from the latin *filium*) is an officer of this court, so called because he files those writs whereon he makes out process.

There are thirteen filacers, among whom the several counties of England are divided, viz.

For the Counties of	Who executed by.	For the Counties of	Who executed by.
Bedford Berks Bucks Cornwall Gloucester Hereford Oxon Worcester	P. Jones, Esq. Executed by Mr. Roberts, No. 4, Hare Court.	Hants Wilts	{ Mr. Tho. Iawes. Executed by Mr. Roberts.
London and Middlesex		Norfolk Norwich Stafford Northampton S. Lop Rutland Monmouth	
Suffex Surrey Kent	{ Willes, Esq. Executed by Mr. Roberts.		{ Mr. Roberts, and executed by him- self.
Bristol Dorset Dorset Somerset		Essex Herts	
Suffolk	{ Mr. Robert Hollo- way. Executed by Mr. Roberts.	Cumberland Northumberland Newcastle Westmoreland Devon	{ Mr. King. Exe- cuted by Mr. Roberts.
Cambridge Huntingdon			
Derby Leicester Nottingham Warwick	{ Mr. Clarke. Exe- cuted by Mr. Clarke.	Lincoln and City of Lincoln	{ Mr. Batten Exe- cuted by him- self, No. 4, Hare Court.
		Kingston upon Hull York and Yorkshire	
	{ Mr. Lenton. Exe- cuted by Mr. Clarke.		{ Mr. Sibthorpe. Executed by Mr. Kelham, No. 92, Hatton-Garden.
	{ Mr. Ward. Exe- cuted by himself, No. 8, Staples Inn.		{ Mr. Allen. Exe- cuted by himself, No. 4, Furnival's Inn.
	{ Mr. Rider. Exe- cuted by himself, at No. 125, Fet- ter-lane.		

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The filacers formerly living at a great distance from the inns of court, which was thought very inconvenient for the practitioners thereof, the court therefore thought proper to make the following rule in *Hilary Term* 1783: "Whereas it would be very convenient to the suitors of this court, if the several offices of the filacers were executed in one place; and the filacers having made a proposal to this court for that purpose; and that the ground chamber at No. 4 in *Hare Court*, in the temple, will be a fit and convenient place for the same, It is ordered by this court, that the several offices of the filacers shall, from and after the first day of the next ensuing *Easter Term*, be executed in the above-mentioned chamber, and that if hereafter it shall be found necessary or proper to appoint another place for the execution of the said offices, instead of the above-mentioned chamber, this court, on application, will take the same into consideration.

" By the Court."

By rule 14 *Jac. 1. 1616*. All manner of *capias alias* and *pluries*, and all other incident procefs, before appearance of the defendant, in all actions wherein procefs of outlawry doth lie (until the exigent awarded), are to be made out by the filacers of this court only: also, all *grand capes*, *pone* and *distringas*, as well peremptory as infinite, and also incident procefs, before appearance of the tenant or defendant, writs of seisin, and writs

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to enquire of damages issuing before appearance of the tenant or defendant (but all judgments upon writs of enquiry of damages are to be entred with the prothonotary only): also all writs of *superseatas* upon any *capias* awarded out of their own offices, and writs of rescous upon the sheriff's return: also the entring of all comparence of writs issuing out of their own offices, the entring of rolls to compel the defendants to appear, their bails upon appearance, and marking the first *scire facias* upon the said bail: also view in dower, or any other action where it lieth entring thereof, and writs of view thereupon, also all writs of *return habend.* upon nonsuit before appearance, writs of *second deliverance* before appearance, writs of *capias in withernem*, alias and *pluries*, likewise before appearance, &c. *ibid.*

They take special bail in common cases, *R. Trim. 1 W. & M. reg. 2.*, appearances are to be entred with them *R. E. 24 Car 2. reg. 2.*, procure the original to be sued forth and filed, *R. Trim. 1649.*, take affidavits of debts, in order to hold to bail, affidavits of the service of process, file bills brought against persons intitled to privilege of parliament, and make out the subsequent process thereon before appearance.

Clerk of the
Warrants.

The clerk of the warrants, inrolments, and estreats is *Keane Fitzgerald Esquire*, who is admitted into the said office by the Lord Chief Justice of this court, his deputy *Mr. Richard Lee, No. 3. Pump Court*, he files all warrants of attorney upon judgments, issues, outlawries, writs of covenant, stamps all
judgment

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judgment papers, records, pluries capias, in outlawry, and writs of covenant; also files the warrants of attorney of sheriffs for the different counties in England.

The clerk of the essoigns is in the appointment of the lord chief justice, and has usually Clerk of the essoigns. been granted for life. The present clerk is Mr. Wright, and it is executed by Mr. Bolton, and essoigns are entered in this office in real actions only, for it is now determined that no essoign lies in personal actions: and in case the defendant doth not essoign by the time limited by the rules of the court in real actions, the plaintiff may enter in this office a *ne recipitur* essoign.

In this office all judgments in this court are docketed, pursuant to the Stat. 4 & 5 W. & M. c. 20. and rolls belonging to the several officers of the said court are marked, numbered, and delivered out to them; and when the proper entries are made thereon, they are returned into this office, and carried by him to the treasury at Westminster.

The office of clerk of the juries is in Clerk of the juries. the gift and nomination of the *custos brevium* for the time being. The present clerk is Mr. Thomas Bever; Mr. Harrison, is Castle-lard, is his deputy.

His duty is to make out writs of *habeas corpora juratorum*, for the trials of issues in London and Middlesex, and at the assizes in the country.

The return-office, and office of inrolment Return-office. of writs for fines and recoveries, is in the nomination of the three puisne judges by virtue of an act of parliament made in the twenty-

Officers of the Court.

twenty-third year of queen *Elizabeth*. Mr. *Henry Barnes* is clerk of the molments, and the office is executed by Mr. *L. barrow*.

Mr. *Lickbarrow* returns all writs of covenant, entry, summons, and sushin, in the names of the sheriffs of the several counties and cities in *England*, and makes regular entries in books, provided at his own charge for that purpose.

The clerk of the king's silver is *William Dawes*, esquire.

This officer claims it to be his duty to inspect and see that all fines passed in his office have regularly passed through the several offices, conformable to the usage of the court, to enter the whole of all fines, together with the poll fine paid thereon, into books which remain in the office as records: he is also to stop all such fines, against the passing of which *certificates* are entred, and file such *certificates* with all rules of court, judges orders, and all other lawts of the counsors, being alive, where *equations* have been brought to this office.

All cavers, and orders for stopping any fines, shall be renewed every term, in 10 copies thereof left with the clerk of the king's silver, for which he is to demand only his ancient fee of 3s. 4d. the term, and in default thereof in *certificates* that shall not be so renewed, shall lose their force and effect. *R. F. 29 Car. 2.*

Where a rasure in the day or year shall appear in the caption of a fine it shall not pass this office without an *order* from a judge. *R. E. 9 Ann.*

The

The office of chirographer is held by Chirograph. Letters pass from the clerk, and Sir George Colclough, Bart. is the present patentee, under whom James Garth, Esq. is appointed secondary to officiate in the said office. There is a register and record keeper belonging to the said office, and the chirographer appoints certain clerks for the several counties in England.

The chirographer draws up, and makes out, from all parts of the fine, the final concord, and ingrosses a record thereof; the office is kept No. 2. *Hare Court, Temple.*

The office of exigenter is executed by Exigenter. Mr. James Meddewcroft, by appointment from the chief justice; he executes the office, No. 8. *Holborn Court, Cr.ys-Inn*: his duty is to make *exigent*, *proclamations* upon *pluries capis*'s, in order to proceed to *outlawry*: also *allocatus*.

The office of clerk of the superfedas to Superfedas. the exigent is executed by Mr. Meddewcroft. It is his business to sign all writs of superfedas to *exigents quia impioride*, &c. in the said court, to prevent a person being outlawed or waived, against whom an *exigent* has issued.

The office of the clerk of the outlawries Outlawries. is incident to the office of his majesty's attorney general, and always executed by some person appointed by him for the time being: the present clerk of the attorney general has it, and his duty is to make out all writs of *copias utlagatum*, *sequestrations* of all ecclesiastical benefices in all personal actions in the said court after the return of the *exigent*. Inquisitions

Officers of the Court.

quisitions taken on special writs of *capias utlagatum* are transmitted into this office, and are here exemplified upon rolls signed by the clerk of the outlawries, and then carried into the office of the king's remembrancer of the court of *Exchequer*, and there filed on record, and the inquisitions themselves, and writs of *exigent*, are filed with the *custas breviarum*.

Seal office.

The most noble *Augustus Henry* Duke of *Grafton* is seized in fee tail of this office, and claimeth the receipt of the revenue arising from the sealing of writs, exemplifications, and other things whatsoever sealed with the seal of this court. Mr. *Samuel Rogers* is his Grace's deputy.

Clerk of the errors.

The clerk of the errors, has the allowance and receipt of all writs of error upon judgments in this court; gives certificates thereof; makes out writs of *superfedeas*; enters bail taken thereon; makes out writs of *scire facias*; gives rules for justifying bail; rules for plaintiffs in error to certify the record; makes transcripts of the records and judgments; transmits the same into the court of *King's Bench*, &c. signs *non-proffes* for not certifying the record; allows and returns all *certioraries* directed to the lord chief justice, for certifying records from this court into any other. Mr. *Stephen Hough*, at Master *Pepys's* chambers in *Symond's Inn*.

Judge's clerks.

The judges clerks are verbally appointed by their respective judges, to continue during pleasure.

The clerks of the lord chief justice make out commissions for taking affidavits and

special bails, and file the approbations signed by one of the puisne judges, in order for such commissions, and enter the names of the commissioners so appointed, in a book kept for that purpose. Mr. *Randall* and Mr. *Avis* are clerks to the chief justice.

The office of associate at *nisi prius* in *Lon-* Associate.
don and *Middlesex* is in the appointment of the lord chief justice, and has been generally granted by parole, to hold during pleasure only. The present associate is Mr. *Randall*.

The office of marshal at *nisi prius*, in Marshal.
London and *Middlesex*, is also in the nomination of the lord chief justice, and has been, time immemorial, granted by parole appointment, to hold during his pleasure. The present marshal is Mr. *Randall*.

Cryer at *nisi prius*, in *London* and *Middle-* Cryer.
sex, is also in the gift of the lord chief justice for the time being, and has been usually granted by parole appointment to hold during pleasure. Mr. *Avis* is cryer.

Heneage Walker, Esquire, hereditary pro- Proclamator.
clamator to this court, granted to *John Walker*, esquire, the chief of marshal proclamator, and barrier of this court, with all fees, &c. to hold to him and his heirs for ever. There are four persons act as cryers to the court; one of which is also court-keeper, and another porter of the court; which cryers, court-keeper, and porter, are deputies to the chief proclamator. Their duty is to attend this court, and make proclamations, &c.

The court-keeper is appointed by the Court-keeper.
chief proclamator, Mr. *Jepkins*.

The

Officers of the Court.

Porter. The porter of the court holds his place by the appointment of the chief proclamator, Mr. *Sto e*.

Warden The warden of the *Fleet* prison is *John Eyles*, esquire, appointed by letters patent to hold during pleasure, he is to receive and have the custody of all prisoners committed by this court to the *Fleet* prison. Mr. *Lowe* is his deputy.

Clerk of the Papers of the Fleet The present clerk of the papers and rules of the *Fleet* prison is Mr. *Lowe*, who holds his place by grant or appointment of the warden.

Tipstaff. There are two tipstaffs attendant on this court, who are admitted by deputation from the warden of the *Fleet* they attend the judges whilst sitting in court, and in the afternoon at their chambers, and out of term they attend there morning and afternoon. One of them also attends the lord chief justice at the sittings of *nisi prius* at *Westminster, London*, and on the circuits.

Attornies of the Court.

AN attorney, *attornatus*, or *attornatus* in law, is an officer appointed by the court, to prosecute or defend actions brought against or prosecuted by their clients, and the word is compounded of the *Latin* word *ad*, to, and the *French*, *tourner*, to turn, "to turn a business over to another." The ancient *Latin* name, according to *Bracton*, is
respon-

responsalis; and they answer to the *procurator*, or proctor, of the civilians and canonists.

Before the *Stat. of West. 2. c. 10.* all attornies were made by letters patent under the great seal, commanding the justices to admit the person to be attorney to such a one, 2 *Inst.* 249. That statute gave all persons liberty of appearing by attorney without any letters patent, otherwise they were to appear each day in court in their proper person; in consequence of which, great numbers of attornies were admitted by the judges, whereby many unskilful ones practised; which occasioned many mischiefs: for restraining of which, it was enacted by *Stat. 4 H. 4. c. 18.* "That the judges should examine them, and at their discretion to put those who were virtuous and of good fame on the roll, and those on the contrary to strike out." And the *Stat. 3, H. 6. c. 7.* limited the number in *Norfolk* and *Suffolk*.

By 13 *W. 3. c. 6.* attornies are to take the oaths to government, under penalties and disability to practise.

12 *G. 1. c. 29.* If any who hath been convicted of forgery, perjury, &c. shall practise, &c. the judge hath power to transport the offender for seven years, by such ways, and under such penalties, as felons.

No person shall be admitted to act as an attorney, sue out any process, or defend any action in this court, unless he shall have been bound, by contract in writing, to serve as a clerk for five years to an attorney duly admitted, as by the statute is directed, and for

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the

Attornies of the Court.

the said term of five years shall have continued in such service, and then be examined, sworn, admitted, and inrolled. 2 Geo. 2. c. 23. s. 5. Made perpetual by Stat. 30 Geo. 2. c. 19. s. 7.

If his master shall die, or the contract be vacated before the five years are expired, then he shall serve the remainder of the five years with another attorney.

If any attorney, with whom any person shall be bound by contract in writing to serve, as aforesaid, shall die before the expiration of such five years, or if such contract shall by mutual consent be vacated, or such clerk be legally discharged by rule or order of court, before the expiration of such five years, then if such clerk shall, by contract in writing, serve as a clerk to some other attorney, admitted as aforesaid, during the remainder of the said five years, such service shall be as effectual as if he had served five years to the person to whom he was originally bound. *Ibid.*

A Quaker, on taking his solemn affirmation, may be admitted attorney.

Any person being one of the people called Quakers, having served a clerkship with an attorney or solicitor, and being qualified as by Stat. 2 Geo. 2. is required, may, on taking his solemn affirmation, instead of the oath by the said act enacted, before such judges, and others who are to administer the said affirmation, be admitted and inrolled as an attorney or solicitor, as if he had taken the said oath. 12 Geo. 2. c. 13. s. 8.

Judge, or other person, who are to administer the said oath, to examine their fitness.

It is provided, that they admit such person, are to enquire touching his fitness and capacity, and if thereby satisfied, and not otherwise, are to administer to him, in open court, the oath after mentioned, and cause him to be admitted an attorney, and his

name

Attornies of the Court.

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name to be inrolled, without fee or reward, except 1s. for administering the oath. *Seet. 6.*

“ I *A. B.* do swear, that I will truly and Oath.
 “ honestly demean myself in the practice of
 “ an attorney, according to the best of my
 “ knowledge and ability.
 “ So help me God.”

The clerk of the warrants of the Common Pleas is, without fee or reward, to inroll the name of every person who shall be admitted an attorney of this court, pursuant to this act, and the time when admitted, in an alphabetical order, in rolls or books to be provided for that purpose, to which all persons shall have recourse without fee or reward. *Seet. 18.* Clerk of the warrants to inroll, &c.

No attorney shall have more than two clerks at one and the same time, who shall be bound by contract in writing. *Ibid.* Not to have more than two clerks

The prothonotaries of this court may have three clerks, and at one and the same time, and no more, and such clerks having served five years may be admitted, &c. in the same manner as any person may, who shall have served a clerkship to a sworn attorney for five years. *Seet. 15.* Prothonotaries may have three.

Any person sworn, admitted, and inrolled an attorney of this court, with consent in writing, and in the name of any attorney of any other court of record at *Westminster*, &c. may sue out any writ, or commence or defend any action in such court, notwithstanding An attorney of this court may sue in any other, with consent of that court.

standing such person be not sworn or admitted an attorney in such court. *Stat. 10.*

May carry on proceedings in Wales by consent.

An attorney of this court may by this clause of the statute, carry on proceedings in the court of great sessions of *Wales*, in name of an attorney of that court, and declare for business and fees. *Barnes 160.*

Sworn attorneys permitting those that are not, to issue out writs, disabled from practice.

If any sworn attorney of this court shall knowingly and willingly permit or suffer any other person to sue out any writ, or commence or defend any action in his name, not being a sworn attorney, or a sworn solicitor in Chancery, &c. and shall be thereof convicted, he shall, from the time of such conviction, be disabled to practise, and his admittance to be void, *Stat. 17.*

A sworn attorney may be admitted a solicitor.

A sworn attorney of this court may be sworn, admitted, and inrolled, a solicitor in all or any of the courts of equity, without any fee for the oath, or any stamp, if the master of the rolls, &c. shall, on examining him, be satisfied that such attorney is duly qualified to be so admitted. *Stat. 20.*

Attorney, &c. in their own name suing out any writ, &c. not inrolled, forfeit 50*l.*

Any person in his own name, or in the name of any other, suing out any writ, or commencing or defending any action, in any of the courts of law or equity, mentioned in the said act as attorney or solicitor, in expectation of any gain, fee, or reward, without being admitted, shall forfeit 50*l.* to the use of the person who shall prosecute, and be made incapable to maintain any action for any fee, reward or disbursement, on account of prosecuting or defending such action. *Stat. 24.*

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Persons bound clerks to attornies, or solicitors, are to cause affidavits to be made and filed of the execution of the articles, within three months next after the date thereof, and in every such affidavit shall be specified the names of every such attorney and solicitor, and of every such person bound, and their places of abode respectively, together with the date of the execution of such articles, and every such affidavit shall be filed with in the time aforesaid, in the court where the attorney or solicitor to whom every such person respectively shall be bound as aforesaid, hath been enrolled as an attorney or solicitor with the proper officer, and none to be admitted before such affidavit be produced and read in court. 22 Geo. 2. c. 46. s. 3, 4.

In this court the clerk of the warrants, or his deputy, shall be the proper officer for filing such affidavits, *sect. 5*, and shall keep a book, wherein shall be entered the substance of such affidavit, specifying the names and places of abode of every such attorney and clerk, and of the person making such affidavit, with the date of the contract, and the days of making and filing such affidavit, and may take, at the time of filing such affidavit, 2s 6d. for his trouble; which book may be touched gratis. *sect. 6*.

No attorney shall hire, take, or retain any clerk, who shall become bound by contract in writing aforesaid, after such attorney shall have discontinued or left off, or during such time as he shall not actually practise or carry on the business of an attorney. *Sect. 7*.

Persons bound to serve as clerks to attorneys, to be made within three months after execution of contract.

None to be admitted before affidavit produced

who are to file such affidavits.

Books to be kept, &c.

No attorney to take a clerk after discontinuing business.

Attornies of the Court.

Clerk to be
employed the
whole time.

Every person who shall become bound, &c. shall, during the whole time or term of service, to be specified in such articles, continue and be actually employed by such attorney or solicitor, or his or their agent or agents, in the proper business, practice, or employment of an attorney or solicitor. *Sec. 8.*

If, before the
expiration of
the time, the
attorney die,
&c. or the
clerk be dis-
charged by
&c.

Provided if any such attorney, to or with whom any such person shall be so bound, shall happen to die before the expiration of such term, or discontinue or leave off his practice, or if such contract shall, by mutual consent of the parties, be cancelled, or such clerk shall be legally discharged by rule of the court, before the expiration of such

and be bound
to serve or
the remainder
of the time,

term; and the said person, in any of the said cases, be bound by any contract or contracts in writing to serve, and shall accordingly serve in manner before mentioned, as clerk to any other such practising attorney or attorneys as aforesaid, during the residue of the said term of five years, then such service shall be deemed and taken to be as good, effectual, and available, as if such clerk had continued to serve as a clerk for the said term to the same person to whom he was originally bound, so as affidavit be duly made and filed of the execution of such second contract or contracts, within the time and in like manner as is before directed, concerning such original contract. *Sec. 9.*

such service
to be good
if affidavit
made and
filed, &c.

Attorney not
to commence
an action for
fees till one
month after

No attorney of this court shall commence any action for the recovery of any fees, charges, or disbursements, until one month after he shall have delivered to the party to be

be charged therewith, or left for him at his dwelling house or last place of abode, a bill of livery of their bills.
 or such fees, charges, and disbursements, in a common English hand, and in the English tongue (except law terms and the names of writs), and in words at length, (except times and sums) furnished with the proper hand of such attorney. And upon application by the party chargeable by such bill, or any other in that behalf authorized, unto any judge of the court, &c. where the business, or the greatest part thereof in amount or value was transacted, and upon submission of the party, or other person authorized as aforesaid to pay the whole, that upon taxation what shall appear due to such attorney, the judge, &c. is required and empowered to refer the bill, and the whole of such demands thereupon (although no action be depending touching the same) to be taxed, without any money being brought into court. And if the attorney, having due notice, shall refuse to attend such taxation, the officer may proceed *ex parte* (pending which reference no action shall be brought), and upon such taxation the party shall forthwith pay to the attorney the whole that shall be found due, and in default be liable to an attachment, or process of contempt, or other proceeding, at the election of the attorney. And if upon such taxation it shall be found that such attorney has been over-paid, then the attorney shall forthwith pay to the party all such money as the officer shall certify to have been so overpaid, and in default, shall in like manner

manner be liable to attachment, or process of contempt, or other proceeding, at the election of the party. And the court is to award costs of such taxation, according to the event thereof, viz. if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs; if not less by a sixth part, the court at discretion shall charge the attorney or client according to the reasonableness or unreasonableness of the bill. 2 Geo 2. c. 23. s. 23.

if less than a sixth, to pay costs;

if not less, the client to pay

Not to extend to any bill of fee between one solicitor and another.

Nothing in the said act contained shall extend to any bill of fees, charges, and disbursements, due from any attorney or solicitor to any other attorney or solicitor, or clerk in court, but that every such attorney, solicitor, or clerk in court, may use such remedy for recovery, of his fees, charges, and disbursements, against such other attorney or solicitor, as he might have done before the making the said act 12 Geo 2. c. 13. s. 6.

A bill may be wrote with such abbreviations as are commonly used in the *English* language. *Ibid* *sect.* 5.

The court will not order that an attorney shall deliver his bill, and that the same should be taxed on one and the same motion, they being distinct matters, and the latter part may prove fruitless, the bill may be reasonable, and no occasion to tax it; but the motion must be for the attorney to deliver his bill, and then, if there be occasion, the client may move to have it taxed; but the more usual way is to summons the attorney before a judge, and if the judge's order be disobeyed, to move the court that the

the order may be made a rule thereof, and then proceed to an attachment in case of further contempt. *Bar es*, 26, 243.

attorney's bill, for business only, is not liable to be taxed, otherwise than by a jury upon a *quantum meruit*. *Burnes*, 41, 42.

After an attorney is dead, his bill is not liable to be taxed. *Rep. Cas. Pract. C P.* 58. *Ba nes*, 42. *S. P.* 119, 122.

If any sworn attorney shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any ways made use of upon the account, or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the court from whence any such process did issue, and proof made thereof upon oath to the satisfaction of the court, that such sworn attorney had offended therein as aforesaid, then every such attorney so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall be lawful for the said court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year. 22 *Geo. 2.* c. 46. s. 11.

Attorney act, ing as agent, or permitting his name to be used for, or sending any process to any unqualified person, thereby to enable him to appear or act as an attorney, to be struck off the roll.

None to act as
solicitor, &c.
who are not
admitted in
accordance to
2 Geo. 2 c. 23.

No person shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter-sessions of the peace, either with respect to matters of a criminal or of a civil nature, unless such person shall have been heretofore admitted an attorney of one of the courts of record at Westminster, and duly enrolled; pursuant to *Stat. 2 Geo. 2. c. 23.*, or be hereafter admitted an attorney, and enrolled as aforesaid, pursuant to this act, or such other law as shall be then in being; and unless such person shall continue to be entered on the roll at the time of such his acting in the capacity aforesaid: but every person who shall so act, not being admitted and enrolled as aforesaid, shall be subject to a penalty of fifty pounds, to be recovered by action of debt, bill, &c. by any person who shall sue for the same, within twelve months after the offence committed, with treble costs of suit. And if an attorney shall permit a person, not being admitted and enrolled as aforesaid, to make use of his name in the courts of general or quarter sessions aforesaid, such attorney shall be subject to the like penalty of fifty pounds, to be recovered as aforesaid. *Stat. 12.*

Proviso ex-
empted.

Provided that nothing herein contained shall extend to deprive the attorney of the duty, or *Tench*, or of the courts of great sessions in *Wales*, or of the *counties palatine of Chester, Lancashire, and Durham*, from a thing within their respective jurisdictions. *Stat. 13.*

No attorney to be lessee in an ejectment, nor bail for a defendant in this court. *R. Mich. 1654. R. M. 6 Geo. 2.*

No person, without rule of court, or order of a judge or prothonotary, and notice to the adverse party or his attorney, shall change or shift his attorney; and such attorney newly coming in, to take notice at his peril of the rules whereunto the former attorney was liable, had he continued. *Mitch.* 1654.

This court will not permit an attorney to be changed in a cause, and another attorney appointed in his stead, till his bill of fees and disbursements be settled and paid. *Barnes*, 40.

The clerk of the warrants is to cause an alphabetical book to be prepared and kept in his office, for inspection *gratis*; wherein every practising attorney, resident in *London* or *Windsor*, or within ten miles thereof, shall have his name and place of abode, or some place within the said cities, or one of them, where he may be served with the proceedings of court; and if a copy of such as do not require personal service, be left at the place last entred with any person there, that shall be deemed good service. *R. Hil.* 9. *Geo.* 3.

If no entry be made, fixing up any of the said proceedings in the prothonotary's office, No. 2, *Trafalder-court*, *Inner Temple* (unless personal service be required), shall be deemed sufficiently served. *Ibid.*

Every attorney of the court pays to the clerk of the warrants 8*d.* a term; viz. 4*d.* a term for the puisne judges (to be distributed in charity), and 4*d.* a term for the cryers of the court. And when any attorney brings a writ of privilege or attachment to be marked, or warrant of attorney to be filed, he must pay the arrears (if any) of his termage.

A coun-

A country attorney is answerable to his client for his agent. *Barnes, 37. qu. Ed.*

Country attorneys and their agents.

Where country attorneys are concerned, declarations, pleas, and other proceedings, should not be delivered and carried on in the country but by the agents in town. If a rule be given to declare, and the plaintiff's attorney in the country agrees that a demand of the declaration may be made on him in the country, which is accordingly done, and a *nonpros* signed for want of a declaration, the *nonpros* is irregular and may be set aside; for by the practice of the court, the declaration should have been demanded of the agent in town.

Time to plead.

If the agent of the plaintiff's attorney gives the agent for the defendant time to plead, the country attorney cannot sign judgment till that time be expired. *Ibid.*

Plea.

A plea being delivered in the country is irregular, and judgment may be signed. *Barnes, 257.*

Issue.

If the country attorneys agree that the issue shall be delivered in the country, and it is notwithstanding tendered in town, and not paid for by the agent, judgment may be signed, for the agreement is void. *Ibid.* But where the defendant pleads by his attorney in the country, and the plaintiff's attorney accepts it, there he may tender the issue in the country, and if not paid for there, may sign judgment.

Notice of trial.

Notice of trial must be given in town; but a countermand may be given in the country.

None but attorneys to practise at

No person shall act as a solicitor, attorney, or agent, or sue out any process at any general

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ral or quarter sessions of the peace, either ^{general or} with respect to matters of a criminal or of ^{quarter ses-} a civil nature, unless such person shall have ^{sions,} been heretofore admitted an attorney of one of the courts of record at *Westminster*, and duly inrolled, pursuant to *Stat. 2 Geo. 2. c. 23.* or be hereafter admitted an attorney, and inrolled as aforesaid, pursuant to this act, or such other law as shall be then in being; and unless such person shall continue so entered on the roll, at the time of such his acting in the capacity aforesaid: but every person, who shall so act, not being admitted and inrolled as aforesaid, shall be subject to a penalty of fifty pounds, to be recovered by action of ^{under penalty} debt, bill, &c. by any person who shall sue ^{of 50 l.} for the same within twelve months after the offence committed, with treble costs of suit.

And if any attorney shall permit any person, ^{No attorney} not being admitted and inrolled as aforesaid, ^{to permit an} to make use of his name in the courts of ^{unqualified} general or quarter sessions as aforesaid, such ^{person to use} attornies shall be subject to the like penalty ^{his name at} of fifty pounds, to be recovered in manner ^{the sessions,} aforesaid. *Stat. 22 Geo. 2. c. 46. s. 12.* ^{under the like} ^{penalty.}

“ That no sheriff, sheriff's clerk, receiver, ^{No under-} nor sheriff's bailiff be attorney in the king's ^{sheriff or} courts, during the time that he is in office ^{clerk, &c. be} with any such sheriff.” *Stat. 1 H. 5. c. 4.* ^{attorney, &c.}

An attorney admitted fraudulently, was ^{Admitted} struck off the roll, and an attachment was ^{fraudulently} granted against the master. *2 Black. Rep.* ^{to be struck} ^{off.} 991.

Attornies are not privileged from serving ^{Not privi-} in the militia, or paying for substitutes in ^{leged from} their stead. *Ibid.* 1120. ^{levying in the} ^{militia.}

Where

Where an attorney of one court sues an attorney of another, the privilege of that court which is possessed of the cause shall be preferred. *Ibid.* 1325.

Attornies lia-
ble to be pu-
nished in a
summary way.

They are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for ill-practice, attended with fraud and corruption, and committed against the obvious rules of justice, and common honesty; but the court will not easily be prevailed on to proceed in this manner, if it appears, that the matter complained of was rather owing to neglect or accident, than design; or if the party injured has other remedy by act of parliament, or action at law. 12 *Mod.* 251, 318, 440, 583, 657.

Also for base
and unfair
dealings.

They are also liable to be punished for base and unfair dealings towards their clients in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expence, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up to their clients writings with which they had been intrusted in the way of business; or money which has been recovered and received by them to their clients use, and for other such like gross and palpable abuse. 2 *Haw. Pl. of the Cr.* 144. 8 *Mod.* 306. 12 *Mod.* 516.

An action lies against an attorney for neglecting to charge a person in execution at his client's suit, according to a rule of court; although it seems it was rather want of judgment than negligence, 3 *Wills.* 325.; but the

the court will not proceed against him for it in a summary way. 4 *Burr.* 2060.

Not bound to discover and give in evidence the contents of a deed shewn by his client, nor any instructions given him by his client; nor can he be forced to act against his will. Not bound to discover, &c.

An attorney or solicitor, having fees due to him, may detain writings until his just fees are paid; but if there are none due to him, the court, on motion, will compel the delivery of them, 1 *Lill.* 148.; but he cannot detain writings, which are delivered upon special trust, for the money due to him in that very business *Med. Cas. L. and Lq.* 306. May detain writings, &c. until paid.

Circuit.

THE courts of *assize* and *nisi prius* are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom (except *London* and *Middlesex*, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are taken only once a year), to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of *Westminster-Hall*. These judges of assize came into use in the room of the antient justices in eyre, who were regularly established, if not first appointed, by the

22 H. 2. with a delegated power from the king's great court, or *aula regia*, being looked upon as members thereof: and they afterwards made their circuit round the kingdom once in seven years, for the purpose of trying causes. *Co. Litt.* 193. The present justices of assize and *nisi prius* are derived from the *Stat. of 13 Ed. 1. c. 3* explained by several other acts, particularly the *Stat. 14 Ed. 3. c. 16.*, and must be two justices of the one bench or the other, or the chief Baron of the Exchequer, or the king's serjeants sworn. They usually make their circuit in the respective vacations of *Hilary* and *Trinity Terms*, assizes being allowed to be taken in the holy time of *Lent*, by consent of the bishops at the king's request, as expressed in the *Stat. of Westm. 1. 3 1 d. 1. c. 51.*

Formerly it was held, that no judge or other lawyer could act in the commission of oyer and terminer, or in that of gaol delivery, within his own county, where he was born, or inhabited; but that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper, by the *Stat. 12 Geo. 2. c. 27.* to allow any man to be a justice of oyer and terminer and general gaol delivery within any county of England.

The judges sit by virtue of five several authorities: 1. The commission of the peace; 2. A commission of oyer and terminer, to hear and determine all treasons, felonies,

lonies, and misdemeanors: 3. A commission of general gaol delivery, which empowers them to try and deliver every prisoner who shall be in the gaol when the judges arrive at the circuit town, whenever indicted, or for what crime committed: 4. A commission of assize, directed to the judges and clerk of assize, to take assizes; that is, to take the verdict of a peculiar species of jury, called an assize, and summoned for the trial of landed disputes: 5. That of *nihi prius*, which is a consequence of the commission of assize, being annexed to the offices of those justices by the *Stat. of Westm.* 2. 13 Ed. 1. c. 30.; and it impowers them to try all questions of fact issuing out of the courts at *Westminster*, that are then ripe for trial by jury. The original of the name is this: all causes commenced in the courts of *Westminster-Hall*, are, by the course of the courts, appointed to be there held, on a day fixed in some *Easter* or *Michaelmas term*, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nihi prius iusticiarii ad assisas capiendas venerint*; unless the day before prefixed, the judges of assize come into the county in question.

This they are sure to do in the vacations, preceding *Easter* and *Michaelmas term*, and there dispose of the cause, which saves much expence and trouble both to the parties, the jury, and the witnesses.

The several counties in *England* are divided into six circuits, viz.

M I D L A N D.

Northampton	Derby
Rutland	Leicester
Lincoln	Warwick.
Nottingham	

N O R F O L K.

Bucks	Cambridge
B. dford	Norfolk
Stuntingdon	Suffolk.

H O M E.

Westford	Suffex
Essex	Sutry.
Kent	

O X F O R D.

Berks	Gloucester
Oxford	Monmouth
Hereford	Stafford
Salop	Worcester.

W E S T E R N.

Southampton	Cornwall
Wilt	Devon
Dorset	Somerset.

N O R T H E R N.

York	Cumberland
Durham	Westmore-
Northumber-	land
land	Lancash re.

The officers belonging to the circuits are, the clerk of the assize, associate, clerk of arraigns, clerk of indictments, judges marshal, cryer, clerk, and tipstaff.

The sheriff of each county, and his deputy, are to attend the judges, and the coroner also attends to deliver in all inquisitions, &c. to the clerk of assize in court, and he is to return all writs of *venire*, *distringas*, and *habeas corpora*: where the sheriff is a party in the suit, the coroner returns those writs of *venire*, &c. which are specially directed to him for that purpose.

Of the Terms.

THE *Terms* are those spaces of time, wherein the courts of justice are open, for all that complain of wrongs or injuries, and seek their rights by course of law or action, in order to their redress; and during which the courts of *Westminster-hall* sit and give judgments, hear complaints, &c.

These *terms* are supposed, by *Selden*, to have been instituted by *William the Conqueror*; but *Spelman* hath shewn that they were gradually formed from the canonical constitutions of the church; being no other than those leisure seasons of the year which were not occupied by the greatest festivals or fasts; or which were not liable to the general avocations of rural business.

In very early times, the whole year was one continual term for hearing and deciding causes; but when our legal constitution came to be settled, the commencement and direction of our law terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of king *Edward the Confessor*, "That from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost; and from three in the afternoon of all Saturdays till Monday morning, the peace of God and of holy church should be kept throughout all the kingdom." And so extravagant afterwards the regard that was paid to these holy times, that

though the author of the Mirror mentions only one vacation of a considerable length, containing the months of *August* and *September*, yet *Britton* is express, that in the reign of king *Edward I.* no secular plea could be held, nor any man sworn on the evangelist's in the times of *Advent*, *Lent*, *Pentecost*, *Trinity*, and *vintage*, the days of the great litanies, and all solemn festivals: but he adds, that the bishops and prelates did nevertheless grant dispensations, of which many are preserved in *Rymer's Fœdera* of the time of king *Henry III.* that assizes and juries might be taken in some of these holy seasons, upon reasonable occasions. And soon afterwards a general dispensation was established in parliament, by *Stat. West. 1. 3 Ed. 1. c. 51.* which declares, that as it is great charity to do right unto all men at all times when need shall be, it is provided, "*That assizes of novel disseisin, mort d'ancefitee, and darrein presentment, shoul be taken in Advent, Septuagesima, and Lent, even as well as requests, and that at the special request of the king to the bishops.*" The portions of time not included within these prohibited seasons, fell naturally into a four-fold division, and from some festival or saint's day that immediately preceded their commencement, were denominated the terms of *Saint Hilary*, *Easter*, *Trinity*, and *Michaelmas*; which terms have been since regulated and abbreviated by several acts of parliament, particularly *Trinity* term, by *Stat. 32 Hen. 8. c. 2.* and *Michaelmas* term, by *Stat. 16 Car. 1. c. 6.* and again, by *Stat. 24 Geo. 2. c. 48.*

There

There are, in each of these terms, stated days, called days in bank, *dec in banco*, that is, days of appearance in this court, called usually *bancum*, or *commune bancum*, to distinguish it from *bancum regis*, which are generally at the distance of a week from each other, and regulated by some festival of the church. On some one of these days in bank, all original writs must be made returnable, and therefore they are generally called the returns of that term, whereof every term has more or less, laid by the *Munor*, c. 5. f. 108. to have been originally fixed by King *Alfred*, but certainly settled as early as the *Stat. 51 Hen. 3. ft. 2.* But though many of the return days are fixed upon *Sundays*, yet the court never sits to receive these returns till the *Monday* after; and therefore no proceedings can be had, or judgment given on the *Sunday*. *Salt. C27. 6 Med. 250. 1 Jon. 156. 2 Lall. Abr. 569.*

The first return in every term is, properly speaking, the first day in that term, as for instance, the octave of Saint *Hilary*, or the eighth day inclusive after the feast of that saint; which falling on the 13th of *January*, the octave therefore, or the first day of *Hilary* term, is the 20th of *January*, and thereon the court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ; wherefore this is usually called the *essoign* day of the term. But the person summoned has three days of grace beyond the return of the writ, in which to make his appearance, and if he appears on the fourth day inclusive, it is sufficient. *2 Lall. Abr. 563. 1 Inst. 135.*

Of the Terms.

RETURNS OF WRITS.

Michaelmas Term, which contains three weeks and two days, hath four Returns.

By Original.

1. On the Morrow of All Souls.
2. On the Morrow of Saint Martin.
3. In eight days of Saint Martin.
4. In fifteen days of Saint Martin.

By Attachment of Privilege, Bill, &c.

1. On () next after the Morrow of All Souls.
2. On () next after the Morrow of Saint Martin.
3. On () next after eight days of Saint Martin.
4. On () next after fifteen days of Saint Martin.

Hilary Term, which contains three weeks, hath four Returns.

By Original.

1. In eight days of Saint Hilary.
2. In fifteen days of Saint Hilary.
3. On the Morrow of the Purification.
4. In eight days of the Purification.

By Attachment, Bill, &c.

1. On () next after eight days of Saint Hilary.
2. On () next after fifteen days of Saint Hilary.
3. On () next after the Morrow of the Purification.
4. On () next after eight days of the Purification.

Easter Term, which contains three weeks and six days, hath five Returns.

By Original.

1. In fifteen days of Easter.
2. In three weeks of Easter.
3. In one month of Easter.
4. In five weeks of Easter.
5. On the Morrow of the Ascension.

By Attachment, Bill, &c.

1. On () next after fifteen days of Easter.
2. On () next after three weeks from the day of Easter.
3. On () next after one month from the day of Easter.
4. On () next after five weeks from the day of Easter.
5. On () next after the Morrow of the Ascension.

Trinity Term, which contains twenty days, and hath four Returns.

By Original.

1. On the Morrow of the Holy Trinity.
2. In eight days of the Holy Trinity.
3. In fifteen days of the Holy Trinity.
4. In three weeks of the Holy Trinity.

By Attachment, Bill, &c.

1. On () next after the Morrow of the Holy Trinity.
2. On () next after eight days of the Holy Trinity.
3. On () next after fifteen days of the Holy Trinity.
4. On () next after three weeks of the Holy Trinity.

Observations on the Terms.

HILARY Term begins *January* the 23d, (except it happens on a *Sunday*, then on the *Monday* following), being always that day eight weeks from which *Michaelmas* Term ended; and ends *February* the 12th, if not *Sunday*, then on the *Monday* following.

Easter Term begins *Wednesday* fortnight after *Easter* day, and ends on the *Monday* next after *Ascension* day.

Trinity Term begins on the *Friday* next after *Trinity Sunday*, that day being appointed by the 32 H. 8. c. 21. and ends the *Wednesday* fortnight after, unless it happens to be on the 24th of *June*, the feast of *Saint John the Baptist*, which is no court day, then it must be adjourned to the next day. See *Cro. Jac.* p. 16. 2 *Bulstrode*, 242.

Michaelmas Term begins *November* the 6th (except it happens on a *Sunday*, then on the *Monday* after), and ends *November* the 28th (if not *Sunday*; if *Sunday*, then the 29th). *Stat.* 24 *Geo.* 2. c. 48.

The issuable terms are *Hilary* and *Trinity*.

There are no sittings in *Westminster Hall* on *Ascension Day*, *Midsummer Day*, and the 2d day of *February*, being the *Purification*.

The first and last days of every term are the days of appearance.

Observations on the Returns of Writs.

ALL non-juridical days must be avoided, as *Sundays*, the *Feast of the Purification* in *Hilary Term*, *Ascension Day* in *Easter Term*, and *Midsummer Day* in *Trinity Term*, if it so happen (unless it happens on *Friday* next after *Trinity Sunday*, for then it is *des juridicus*, by *Stat. 32 H. 8. c. 21.*); and writs returnable on any of these days are not good. 2 *Inst.* 264.

The 11th day of *November*, being the *Feast of Saint Martin*, in *Michaelmas Term*, cannot be said to be in or upon any return; and if a writ be returnable on that day, it must be on *Thursday*, the *Feast of Saint Martin*, or any other day of the week it falls on; and if returnable the day after, the morrow of *Saint Martin*.

Writs grounded on or returnable on general return.

Attachments, &c. on days certain.

All writs issuing out of this court, grounded upon original writs out of *Chancery*, must be made returnable on general return days, as on the *Morrow of the Holy Trinity*; but writs of attachment, and writs subsequent thereto, and writs grounded on bills filed against attornies, and such officers of the court as are entitled to the privilege of the court, or members of the *House of Commons*, writs of *Habeas Corpus*, &c. must be made returnable on a day certain in full term, as on *Friday* next after the morrow of the *Holy Trinity*.

There

~~" bail upon any process issuing out of
 " any superior court, where the cause of
 " action shall not amount to the sum of ten
 " pounds, or upwards, and that in all cases
 " where the cause of action shall not amount
 " to the sum of ten pounds, or upwards, in
 " any superior court (and the plaintiff or
 " plaintiffs shall proceed by the way of
 " process against the person) he, she, or
 " they shall not arrest, or cause to be arrest-
 " ed, the body of the defendant or defend-
 " ants, but shall serve him, her, or them
 " personally, with a copy of the process.~~

Where the
 cause of action
 amounts to
 10*l.* affidavit
 to be made
 thereof, and
 the sum in-
 dorsed on the
 back of the
 writ.

" That from and after the said 24th day
 " of *June* 1726, in all cases where the plain-
 " tiff or plaintiffs cause of action shall
 " amount to the sum of ten pounds, *affidavit*
 " shall be *made* and *filed* of such *cause* of
 " *action* (which affidavit may be made be-
 " fore any judge or commissioner of the
 " court out of which such process shall
 " issue, authorized to take affidavits in such
 " courts, or else before the officer who shall
 " issue such process, or his deputy), which
 " oath such officer, or his deputy, are here-
 " by impowered to administer; and for such
 " affidavit one shilling, over and above the
 " stamp duties, shall be paid, and no more;
 " and the sum or sums specified in such
 " affidavit shall be indorsed on the back of
 " such writ or process; for which sum or
 " sums so indorsed the sheriff, or other offi-
 " cer to whom such writ or process shall be
 " directed, shall take bail, and for no more:
 " But if after the said 24th of *June* 1726,
 " any writ or process shall issue for the sum
 " of

“ of ten pounds or upwards, and no affidavit and indorsement shall be made, as
 “ aforesaid; the plaintiff or plaintiffs shall
 “ not proceed to arrest the body of the defendant or defendants, but shall proceed
 “ in like manner, as is by this act directed
 “ in cases where the cause of action does not
 “ amount to the sum of ten pounds, or forty
 “ shillings, or upwards, as aforesaid. *Ibid.*
 “ s. 2.”

By the 11 & 12 *W. 3. c. 9. S. 2.* it is enacted, “ That no sheriff or other officer within the principality of *Wales*, or county palatine, upon any writ or process issuing out of any of his Majesty’s courts or record at *Westminster*, shall hold any person to special bail, unless an affidavit be first made in writing, and filed in that court, out of which such writ or process is to issue, signifying the cause of action, and that the same is twenty pounds and upwards; and where the cause of action is twenty pounds and upwards, bail shall not be taken for more than the sum expressed in such affidavit.”

By the 19 *Geo. 3. c. 70. s. 1.* it is enacted, “ That from and after the 1st of July 1779, no person shall be arrested or held to special bail, upon any process issuing out of any inferior court, where the cause of action shall not amount to the sum of ten pounds, or upwards; but that copies of process shall be served (for the service of which process, a sum not exceeding two shillings and six pence shall be allowed in costs), and the like proceedings shall

No sheriff &c. in *Wales*, &c. shall hold person to special bail, unless the cause of action be 2 *l.*

After 1 July 1779, no person shall be arrested, or held to special bail, upon any process issuing out of an inferior court for less than 10*l.*

“ shall be had thereupon in such inferior
 “ court, in all cases where the cause of ac-
 “ tion shall not amount to the sum of ten
 “ pounds, or upwards, as are directed to be
 “ had by the 12 Geo. 1. c. 29. in such in-
 “ ferior court, in all cases where the cause
 “ of action shall not amount to the sum of
 “ forty shillings. *Stat. 1.*

Proceedings
 therein in
 causes of 10*l*
 or upwards,
 and in causes
 of 4*l*s. or up-
 wards.

“ That from and after the 1st of July
 1779, in all cases in such inferior court
 “ (having jurisdiction to the amount of ten
 “ pounds, or upwards), where the cause of
 “ action shall amount to ten pounds, or
 “ upwards, the like affidavit shall be made
 “ and filed of such cause of action, and
 “ proceedings shall be had thereupon, as
 “ are directed by the said act of 12 Geo. 1. to
 “ be had, where the cause of action amounts
 “ to the sum of forty shillings, or upwards,
 “ in such inferior court. *Stat. 2.*”

By the 12 Geo. 1. c. 29. “ The inferior
 “ courts could hold to bail for forty shil-
 “ lings or upwards; if under that sum, the
 “ party plaintiff was to proceed by way of
 “ service of the copy of process on the de-
 “ fendant personally.”

No seamen
 shall be liable
 to be taken
 out of his ma-
 jesty's service
 otherwise than
 for some cri-
 minal matter,
 unless the debt
 amounts to
 20*l*.

By 1 Geo. 2. c. 14 s. 15. it is enacted,
 That no person whatsoever, who shall list
 and enter himself to serve his majesty, as a
 seaman onboard any of his majesty's ships
 or vessels, shall be liable to be taken out of
 his majesty's service by any process or exe-
 cution whatsoever, other than for some cri-
 minal matter, unless for a real debt, or for
 other just cause of action, and unless, before
 the taking out such process or execution, not
 being

being for a criminal matter, the plaintiff or plaintiffs therein, or some other person or persons on his or their behalf, shall make affidavit before one or more judge or judges of the court of record, or other court, out of which such process or execution shall issue, or before some person authorized to take affidavits in such courts, that to his or their knowledge the sum justly due and owing to the plaintiff or plaintiffs, from the defendant or defendants, in the action, or cause of action, on which such process shall issue, or the debt or damage and costs for which such execution shall be issued out, amounts to the value of twenty pounds at the least, a memorandum of which oath shall be marked on the back of such process or writ, for which memorandum or oath no fee shall be taken; and if any person shall be, nevertheless arrested, contrary to the intent of this act, it shall and may be lawful for one or more judge or judges of such court, upon complaint made thereof by the party himself, or by any his superior officer, to examine into the same by the oath of the parties, or otherwise, and by warrant under his or their hands and seals, to discharge such seamen so arrested, contrary to the intent of this act, without paying any fee or fees, upon due proof made before him or them, that such seaman so arrested was actually belonging to one of his majesty's ships or vessels, and arrested contrary to the intent of this act, and also to award to the party so complaining such costs, as such judge or judges shall think reasonable; for

‡

the

the recovery whereof he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff in the said action might have had for the recovery of his costs, in case judgment had been given for him, with costs, against the defendant in the said action.

Plaintiff, upon notice, &c. may enter a common appearance, and proceed to judgment, &c.

Sett. 16. That it shall and may be lawful to and for any plaintiff, upon notice first given in writing of the cause of action, to such seaman or seamen in his majesty's service, or left at his or their place of residence, before his entering into his majesty's service, to file a common appearance in any action to be brought for or upon account of any debt whatsoever, so as to entitle such plaintiff or plaintiffs to proceed therein to judgment and outlawry, and to have an execution thereupon, other than against the body or bodies of him or them so actually belonging to one of his majesty's ships, as aforesaid.

A seaman upon the ship books, though he has absented himself, is a seaman within the act. *Barnes* 95.

No volunteer soldier liable to process, unless for a real debt of, &c.

By *Stat. 23 Geo. 3. c. 52. s. 64.* " No person who is or shall list and enter himself as a volunteer in his majesty's service as a soldier, shall be liable to be taken by any process or execution whatsoever, other than for some criminal matter, unless for a real debt or other just cause of action, and unless before the taking out such process or execution (not being for a criminal matter), the plaintiff, or some person

“ person on his behalf, shall make affidavit, Oath of the
 “ that to his or their knowledge the original debt to be
 “ sum justly due and owing to the plaintiff made before a
 “ from the defendant, in the action, or cause judge, &c.
 “ of action, on which such process shall
 “ issue, or the original debt for which such
 “ execution shall be issued out, amounts to
 “ £20 at least, over and above all costs
 “ of suit in the same action, or in any other
 “ action on which the same shall be ground-
 “ ed; a memorandum of which oath shall and a memo-
 “ be marked on the back of such process or randum there-
 “ writ: and if any person shall be arrested of marked on
 “ contrary, it shall be lawful for one or the process.
 “ more judge of such court, upon com-
 “ plaint thereof made by the party himself,
 “ or by any of his superior officers, to exa-
 “ mine into the same by the oath of the
 “ parties, or otherwise, and by warrant
 “ under his or their hands and seals, to dis-
 “ charge such soldier, without fee, upon
 “ due proof made that such soldier so ar-
 “ rested was legally enlisted as a soldier in
 “ his majesty's service, and arrested contrary
 “ to the intent of this act; and also to award
 “ to the party so complaining such costs as
 “ such judge shall think reasonable; for the
 “ recovery whereof he shall have the like
 “ remedy that the person who takes out the
 “ said execution might have had for his
 “ costs, or the plaintiff in the like action
 “ might have had for the recovery of his
 “ costs, in case judgment had been given
 “ for him with costs against the defendant in
 “ in the said action.”

Plaintiff
filed
affidavit
and process
to execute
against the
goods.

stat. 65. "Any plaintiff, upon notice first given in writing, of the cause of action to such person or persons so entitled, or left at his or their last place of residence before such enlisting, to file a common appearance in any action to be brought for or upon account of any debt whatsoever by or to entitle such plaintiff to proceed therein to judgment and outlawry, and to have an execution thereupon, other than and against the body or bodies of him or them so listed as aforesaid."

Serjeants are within this act as well as private men, *1015* *1* *drum.* *1* *Rich. Re-*
port 29

The party
for a return
of any person
at the suit of
another, not
knowing
the cost.

"If a person procure another to be arrested in the *Mutiny*, or in any other court within *London*, &c. at the suit of any person, where there is no such person known, or without the plaintiff's consent, every person who shall procure any arrest, &c. and shall be accused by indictment, presentment, or by the testimony of witnesses, or other due proof, shall suffer six months imprisonment, without bail or mainprize, and pay to the party arrested treble costs, and forfeit the sum of ten pounds for every such offence, to be recovered by action of debt, &c. against such person or persons, their heirs, executors, or administrators, as should or ought to pay the same by virtue or force of this act, in which action no effoign shall be allowed. 8 *Eliz. c. 2.*
sect. 4, 5.

The

The plaintiff brought a former action against the defendant, held him to bail for 7*l.* declared against him in an action on the case, upon a special agreement in writing under the defendant's hand and seal, not stamped; and the cause being at issue, the plaintiff's attorney found out he had made a mistake in declaring in an action upon the case, the writing being made and executed in *Ireland*, where no stamps are necessary, was a good deed, and the plaintiff ought to have declared in covenant, therefore he discontinued that action upon payment of costs; and having now brought this writ for the same cause of action, and arrested the defendant a second time, whereupon the sheriff hath returned a *cepi corpus*, it was moved that the defendant might be discharged out of the custody of the sheriff upon a common appearance, which the court refused. *Bates & Berry, ejq; v Wils.* 281. See another case in *Barnes* 62. *qu. edit.*

If the plaintiff be nonsuited in debt on bond, he may bring a new action thereon, and hold the defendant to bail. *Barnes* 73.

In *debt, assumpsit, trover, and covenant for payment of money*, may hold defendant to bail of course. *Barnes* 80. *1 Wils.* 23. So for fees and disbursements as attorney in this court, *R. A.* 1654. *See* 12.

If the action be in covenant where no money is covenanted to be paid to the plaintiff, *Parnis* 108.; trespass, assault, battery, detainue, special action on the case, conspiracy, false imprisonment, slander (except in slander of title), cannot hold the defendant

bail, unless there is an order from the court or a judge, *Barnes* 80. *R. M.* 1654. *f.* 12. nor in an action for a malicious prosecution. *Barnes* 76.

Where damages are reduced to a certainty, as by a covenant to pay, &c. plaintiff is entitled to bail.

Where damages can be reduced to a certainty, as in covenant for payment of money, or where a tenant covenants with his landlord to pay a certain sum for every acre of land he plows up, or the like, the plaintiff is intitled to bail, otherwise not, especially without a judge's order previous. It is not reasonable that defendant should be held to bail for such damages as plaintiff fancies he has sustained, and is pleased to swear to. *Barnes* 108.

Bail upon the 9th of Ann, c. 14. against the winner.

Upon the 9 *Ann. c.* 14. which gives an action of debt within three months against the winner, the question was, whether the defendant could be held to bail? the defendant's counsel comparing it to the case of actions upon penal statutes, where no bail is ever required. But the court held, there ought to be special bail in this case, which is at the suit of the party grieved, and wherein the defendant is a debtor to the plaintiff; and the clause is to be considered as remedial: and therefore upon consideration, and talking with the other judges, special bail was ordered. *Turner v. Warren. Str* 1079.

Defendant may be held to bail in debt on the judgment.

In debt on the judgment, the defendant may be held to bail, if no bail given in the original action, notwithstanding a writ of error be brought on the original action, and bail be given on the writ of error. *Kendal v. Carey. 2 Black. Rep.* 768. *Comyn's Rep.* 556. *Pract. Reg.* 57.

In an action on the judgment upon a non-suit, the defendant in that action may hold the plaintiff to bail for the costs, if they amount to ten pounds, or upwards; for costs recovered on a groundless prosecution are as fair a debt, as for any other consideration. *Nightingale v. Nightingale.* 2 *Black. Rep.* 1274.

In an action for double rent, upon holding over, upon the 4 *Geo. 2. c. 28.* plaintiff may require special bail. Double rent.

The original debt was under ten pounds. Plaintiff recovered, and brought debt on the judgment, which was fourteen pounds ten shillings, and held defendant to bail; whereupon he moved for a common appearance. *Sed per Cur.* The debt which we are to consider is the sum recovered, and plaintiff is entitled to special bail. *Barnes* 432. If the damages recovered with the costs amount to 10 l. or upwards, the defendant may be held to bail.

What Persons are not to be held to Bail in Civil Cases.

PEERS of the realm, members of parliament, peeresses by birth, 1 *Inst.* 131. 2 *Inst.* 50. 4 *Bacon's Abr.* 228.; peers of Scotland, 2 *Str.* 990.; A peeress by marriage, *Co. Lit.* 16.; 6 *Co.* 53. *Dyer* 79.; members of convocation actually attending thereon, 8 *H. 6. c. 1.*; bishops, ambassadors, or the domestic servant of an ambassador, really and bona fide in that capacity, *Stat. 7 Ann. c. 12.* 3 *Wils.* 33.; the king's servants, 1 *Ray.* 152. 8 *Mod.* 12.; marshal, warden of the

Fleet, 1 *Vent.* 65.; clerks, attornies, and all other persons attending the courts of justice, 4 *Inst.* 71. 2 *Inst.* 551. 12 *Mod.* 163.; clergymen performing divine service, and not merely staying in the church with a fraudulent design, 50 *Ed.* 3. c. 5. 1 *R.* 2. c. 16.; suitors, *Bro. Privil.* 57.; witnesses subpoena'd, and other persons necessarily attending any court of record upon business, Sir T. Aym. 101. 1 *Vent.* 11. *Rules in Chanc.* 217.; witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, 1 *Atk.* 54.; heirs, executors, or administrators, *R. M.* 1654.; a bankrupt for forty-two days, unless before in prison, 5 *Geo.* 2. c. 30; sailor or volunteer soldier (unless the debt is twenty-pounds), 1 *Geo.* 2. c. 14. f. 15. 23 *Geo.* 3. c. 52. f. 64.; an attorney attending on a summons, *Barnes* 178., also the courts not only protect the persons of their attendants, but likewise all those things that are necessary for their journey or the defence of their suit, 2 *Vol. Acc.* 273.; but the privilege the court allows their officers is restrained to those suits only, which they bring in their own right, or are brought against them in their own right, for if they sue or be sued as executor, or administrators, they then represent common persons, and are not entitled to privilege, 1 *Hob.* 177. *Dyer* 24. pl. 150. 2 *Sid.* 199. *Godb.* 10.

Also if a privileged person brings a joint action, this destroys his privilege; because those with whom he joins are not officers of the court, nor entitled to the attachment which

which the court grants to its own officers.
2 Ro^l. Abr. 274.

A party who has attended his cause all day in court, and in the evening retires with his attorney and witnesses, at a tavern in *Palace-yard*, is privileged from arrests, *contra re teundi*, 2 L^o. R. p. 1112.; but a defendant, illegally in custody at the suit of one plaintiff, is not privileged from arrests at the suit of another, unless there be some collusion. *Ibid.* 283.

A bankrupt is free from arrest in going and coming to surrender to the commissioners; and from actual surrender to forty-two days, or such further time as shall be allowed to finish his examination (provided he is not in custody at the time of surrender); and if he be arrested before debt, or on any escape warrant, coming to surrender, or after his surrender, within the time before mentioned, then, on producing the summons, or notice, under the hands of the commissioners or assignees, and giving the officer a copy thereof, he shall be discharged; and if detained, such bankrupt shall have for his own use five pounds for every day he detains him. Stat. 5 Geo. 2. c. 30.

Formerly the privilege from arrests extended to the servants of peers and members; but they are not now prohibited from being arrested, by Stat. 10 Geo. 3. c. 50. s. 2.

Servants of
peers not pro-
tected.

Affidavits.

Affidavit.

AFFIDAVIT signifies in law, an oath in writing; and to make *affidavit* of a thing, is to testify it upon oath. An *affidavit*, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath; and the true place of *habitation*, and true *addition* of every person who shall make an affidavit, is to be inserted therein, 1 *Lill. Abr.* 44. 46.; *Affidavits* ought to set forth *matter of fact only*, which the party intends to prove by his affidavit, and not to *declare the merits of the cause*, of which the court is to judge.

What it is to contain.

An affidavit must set forth the matter *positively*, and all *material circumstances* attending it, that the court may judge whether the deponent's conclusion be just or not. 1 *New Eb.* 66.

'T's to be fil.

The affidavit must be *filed* before or at the time of *suag out the writ*, or the court will discharge the party from the arrest, on filing a common appearance. 2 *Wils.* 225.

Cannot join debt and case in one affidavit.

If the plaintiff joins debt and case together in one affidavit, the court will discharge defendant, because it is a fraud on the stamp duty.

Nor against several defendants, where the action is several.

So where several defendants are joined, and the cause of action is several, there must be separate stamps for the affidavit. *Barnes* 85.

Affidavit defective.

There must be a positive oath upon which a perjury can be assigned, therefore the court held, that where an affidavit of debt was made,

made, that defendant *is* indebted, &c." instead of "*is* indebted," was held to be defective. 2 *Wils.* 226.

And an affidavit made by one convicted of felony, or a pickpocket returned from transportation, is not sufficient to hold to bail. *Barnes* 78, 79.

But an affidavit made by one convicted of perjury was held sufficient: for though plaintiff cannot be a witness, yet he must not be stripped of his legal remedy to recover his just debts. *Barnes*, 116.

An affidavit to hold to bail was, that the defendant on the 10th of October, 1767, entered into a bond for five thousand pounds, with *Thomas Rice Stephen*, to the plaintiff, conditioned for payment of rent to *Thomas Rice Stephen*, for certain estates in Ireland, to the plaintiff his lessor; and that two thousand three hundred pounds, now due to the plaintiff, on account of the rent of said *Thomas Rice Stephen*, this was held sufficient by Mr. Justice Gould and *Nares*; but *Blackstone's justice* said, "that the affidavit ought to be positive." 2 *Black. Rep.* 740.

This court admits of a supplemental affidavit to be made of the debt; for though a debt was sworn to by a third person, that the defendant was indebted, as appears by a stated account, and held insufficient; on shewing cause against a common appearance, the defect was supplied by a subsequent affidavit of defendant's acknowledging the stated account, the rule was discharged. *Swarbuck v. Wheeler. Barnes, quar. Ed.* 100.

N. P. The court would not receive a supplemental affidavit in the case of *Ree v. Greenham*, where the affidavit was, "that the defendant unjustly indebted," *2 H. Blf* 226.

Executor a
fidavit sup-
plied.

But where an executor at first only swore to the debt as appeared by the accounts of the deceased, a subsequent affidavit that he believed the debt to be due, was on shewing cause produced, and the rule for a commission appeared discharged. *1 L. R. 1 v. Catty*. 2 *B. & C.* 350.

Judges may
impose
commission
to take an
affidavit.

By *stat. 21 Geo. 2. c. 5. s. 1.* The judges, &c. of the court of *Chancery*, by commission, may give power to persons, in the several counties of *England*, to take affidavits concerning matters depending in their several courts.

What affidavits
may be
sworn to before
a commissioner
or who is an
attorney in
the cause.

By rule *F. 13. Geo. 2.* "It is ordered, that from and after the 5th of *May*, in this present term, all such affidavits to hold the defendant to bail, or of the service of process where only a common appearance is required, may be sworn before the plaintiff's attorney or any commissioner, and may be made use of for the purpose aforesaid."

The sum of
taking a
fine to have
but 12d.

By *stat. 3. of the same statute*, the sum of twelve pence, and no more, besides the duty, is to be taken by a commissioner.

Affidavits.

In the Common Pleas.

For work
done and ma-
terials found.

John Doe, of *White Street, Chancery Lane, London*,
Taylor, maketh oath and saith, that *Richard*

Roe is justly indebted unto this deponent in twenty pounds, for the work and labour of this deponent, done and performed for the said *Richard Roe*, and for materials found in the said work.

Every tradesman's bill for work done may be included in this affidavit.

John Doe, of *Milk-street, Cheap-side, London*, warehouseman, maketh oath and saith, That *Richard Roe* is justly indebted unto this deponent in ten pounds and upwards, for goods sold and delivered.

For goods sold and delivered.

John Doe, of, &c. maketh oath and saith, That *Richard Roe*, is justly indebted unto this deponent, in one hundred pounds, for money lent and advanced.

For money lent.

For money by this deponent laid out, expended, and paid for the said *Richard Roe*.

For money laid out.

For money by the said *Richard Roe*, had and received to and for the use of this deponent.

For money had and received.

Indebted unto this deponent in one hundred pounds, on an account stated between this deponent and the said *Richard Roe*.

Upon an account stated.

For the work and labour of this deponent by him done for the said *Richard Roe*, and for materials found therein, and for divers goods by this deponent sold and delivered to the said *Richard Roe*, and also for money by this deponent laid out, expended, and paid for the said *Richard Roe*, and for money lent and advanced by this deponent to the said *Richard Roe*, and also for money by the said *Richard Roe* had and received, to and for the use of this deponent.

For work done, and materials found, goods sold and delivered, money laid out, lent, and money had and received.

John Denn, of, &c. woollen draper, maketh oath and saith, That *Richard Denn* is justly indebted to this deponent, and his partner,

For goods sold and delivered by partners.

Affidavits.

partner, *Richard Roe*, in one hundred pounds, for goods sold and delivered.

The plaintiff's servant, if he knows of the debt being contracted, may (in the absence of the master) make affidavit of the debt being due, which will hold defendant to bail; then the affidavit will run thus:

For goods sold and delivered, made by a servant.

Joseph Lamb, servant to *Richard Fenn*, of *Newgate-street, London*, leatherfeller, maketh oath and faith, That *John Denn* is justly indebted to the said *Richard Fenn*, in forty pounds, for goods sold and delivered, and for work done.

If the work be done by a carpenter, coach-maker, or any other trade, wherein servants and carriages are employed, the affidavit may be thus (though in point of law all is supposed to be done by the master, and may be so laid in the declaration):

For work done by the plaintiff and his servants, &c.

For the work and labour of this deponent, done and performed by himself and his servants for the said *John Denn*, with his horses, carts, and other carriages.

For the hire of horses.

For the hire of divers horses, mares, and geldings, of this deponent, by him this deponent let to the said *John Denn*, and at his request.

For work done as a surgeon, and medicines.

For the work and labour of this deponent as a surgeon, by him done and performed, in and about the healing and curing of the said *John Denn* of divers wounds, and also for divers medicines, potions, and plasters, by this deponent found and provided for the said *John Denn*, and at his request.

For medicines found as an apothecary.

For divers medicines, and other things, found and provided, administered and applied,

to

to the said *John Denn*, by this deponent as an apothecary, and to divers of the family of the said *John Denn*, and at his request.

For feeding and depasturing of divers cattle of the said *John Denn*, at his request, for the space of six weeks, now elapsed.

For depasturing of cattle.

For the use and occupation of a certain messuage, and divers acres of land, with the appurtenances, situate in the parish of *Highbury*, in the county of *Bucks*, for one year, now elapsed.

For the use and occupation of a house and land.

For the use and occupation of a certain messuage, with the appurtenances, situate in *Irish Street, Soho*, in the county of *Middlesex*, held by the said *John Denn* of this deponent, for the space of one year, now elapsed.

The like of a messuage.

For the use and occupation of certain rooms and apartments, in a certain messuage of this deponent, situate in *Fleet-street, London*, held and enjoyed by the said *John Denn*, for the space of half a year, now elapsed.

For part of a messuage.

For certain arrears of rent, due and owing from the said *John Denn* to this deponent, for the use and occupation of a certain messuage or tenement, with the appurtenances, situate and being in the parish of *Saint Bride's, Fleet-street, London*, demised by this deponent, by indenture of lease, to the said *John Denn*.

For arrears of rent due on a lease.

For a gelding, sold and delivered by this deponent to the said *John Denn*, at his request.

For a gelding sold.

For meat, drink, washing, lodging, and other necessities, by this deponent found and provided

For meat, drink, washing, &c.

provided for the said *John Denn*, and his family, at his request.

Notes of Hand.

Drawee against the drawer.

John Denn, of *Burford*, in the county of *Oxford*, farmer, maketh oath and saith, That *Richard Fern* is justly and truly indebted unto this deponent in the sum of fifty pounds, as the drawer of a promissory note, payable to this deponent or order, at a certain day now past (or on demand).

Indorsee against drawer.

Upon a promissory note of hand, drawn by the said *Richard Fern*, payable to one *A. B.* or order, and by him indorsed to this deponent.

Indorsee against the indorser.

Is justly indebted unto this deponent in fifty pounds, as the indorsee or a promissory note of hand, indorsed to this deponent.

On a note, where part has been paid, drawer against the drawer.

Is justly indebted unto this deponent in fifty pounds, upon a promissory note drawn by the said *Richard Fern*, payable to this deponent, or order, for one hundred pounds, at a day now past.

Quaker's affirmation

A. B. of, &c. (being one of the people called *Quakers*) solemnly avirms, That *C. D.* is justly indebted unto this deponent in the sum of twenty pounds, upon a promissory note of hand, drawn by the said *C. D.* payable to this affirmant, or order.

Bills of Exchange.

Drawee against acceptor

A. B. of, &c. grocer, maketh oath and saith, That *C. D.* is indebted to this deponent

ment in seventy pounds, as acceptor of a bill of exchange, payable to this deponent or order.

Indebted to this deponent, as indorsee of Indorsee a bill of exchange in seventy pounds, against the drawer, accepted by the said C. D.

In seventy pounds, as the indorsee of a Indorsee a bill of exchange drawn by the said C. D. against the drawer, upon one A. B. payable to L. F. or his own when payable to his own order, and by him indorsed to this deponent.

A. B. of, &c. maketh oath and faith, In trover for That his cause of action against John Doe is good for converting and disposing of divers goods and chattels of this deponent's, of the value of one hundred pounds, which he refuseth to deliver, although this deponent hath demanded the same.

That C. D. now hath, or lately had in his Trover for a possession, a certain promissory note of hand of this deponent's, bearing date the 5th day of June 1783, whereby one A. B. six weeks after the date thereof, promised to pay to this deponent, or order, forty pounds, for value received, and which said promissory note the said defendant hath unlawfully converted to his own use.

That C. D. now hath, or lately had in his Trover for a possession, a certain bond or obligation of this deponent's, bearing date the 10th day of January 1783, entered into by one A. B. to this deponent, in the penal sum of four hundred pounds, conditioned for the payment of two hundred pounds, as therein mentioned; and which said bond the said de-

defendant hath unlawfully converted to his own use.

The like for
deeds gene-
rally.

That *C. D.* now hath, or lately had in his possession, divers deeds and writings of this deponent, of the value of four hundred pounds, and which deeds and writings the said defendant hath unlawfully converted to his own use.

In detinue.

That *C. D.* holds and unjustly detains from this deponent a certain indenture of lease, bearing date the 4th day of *February* 1783, made between *C. D.* of, &c. of the one part, and *A. B.* of, &c. of the other part, and which said indenture is of the value of twenty pounds and upwards to this deponent.

On Bond.

On a bond.

J. K. of, &c. hofier, maketh oath and faith, That *C. D.* is justly indebted unto this deponent in one hundred pounds and upwards, for principal and interest due on a bond, bearing date the 4th day of *May* last past, entred into by the said defendant to this deponent, in the penal sum of two hundred pounds, conditioned for the payment of one hundred pounds, and lawful interest for the same.

On an assign-
ment of a
bond, made
by the af-
ficee.

J. D. of, &c. gentleman maketh oath and faith, That *C. D.* did, by his bond, bearing date the 3d of *February* last past, become bound unto *A. B.* of, &c. mercer, in the penal sum of two hundred pounds condi-
tioned

tioned for the payment of one hundred pounds, and lawful interest, on a certain day now past. And this deponent further saith, That the said *A. B.* did, by indenture, bearing date the day of last past, assign, transfer, and set over the said bond unto him, this deponent, and all monies due and owing thereon, for a valuable consideration then paid by this deponent to the said *A. B.* And this deponent further saith, That he hath not received any part of the said one hundred pounds, or the interest thereof due on the said bond; nor hath the said *A. B.* to the knowledge or belief of this deponent, received the said one hundred pounds, or any part thereof, or the interest thereof, since the said assignment; and that the said *C. D.* is now justly indebted unto this deponent, as assignee as aforesaid, in the sum of one hundred and two pounds ten shillings, for the principal and interest due upon the said bond.

A. B. of, &c. mercer, maketh oath and saith, Affidavit for money due on a judgment. That *C. D.* is justly and truly indebted unto this deponent in thirty pounds, on and by virtue of a judgment recovered by this deponent in this honourable court, against the said defendant as of *Easter* term last past; and also in the further sum of five pounds for his costs and charges sustained therein; and which judgment was obtained by this deponent upon and by virtue of a bond entered into by the said defendant to this deponent, in the penal sum of four hundred pounds.

A. B. of, &c. grocer, maketh oath, and On an annuity bond. saith, That *C. D.* is indebted unto this deponent

ponent in pounds, for the arrear of a certain annuity due to this deponent, upon and by virtue of a bond, bearing date the day of 1783, entered into by the said defendant to this deponent, in the penal sum of pounds, conditioned for the payment of the sum of pounds a year, for the life of the said defendant, to this deponent.

By the assignee of a bankrupt.

Barnes 91.

A. B. of, &c. tallow-chandler, maketh oath and faith, That *C. D.* is indebted unto this deponent and *J. M.* as assignees of the estate and effects of *J. K.* a bankrupt, in twenty pounds, as appears by an account under the bankrupt's hand, and delivered to this deponent, and which sum this deponent verily believes to be due from the said defendant to the estate of the said bankrupt.

By an executor, for goods sold and delivered.

J. K. of, &c. grocer, executor of the last will and testament of *A. B.* deceased, maketh oath and faith, That the above defendant is justly indebted unto this deponent, as executor as aforesaid, in fifty pounds for goods sold and delivered by said *A. B.* in his life-time, as appears by the books of the said *A. B.* and which sum is now due from the said deponent to the estate of the said *A. B.* as he verily believes.

Upon a note, by an executor.

Barnes 70.

Upon a promissory note given by the defendant to the said *A. B.* in his life-time, as he believes, and as appears to this deponent by the note in his custody, and which said sum is now due to this deponent, as executor as aforesaid, as he verily believes.

In order to hold the defendant to bail for an assault, an affidavit must be prepared, and laid before a judge for his order for that purpose; which affidavit is ingrossed on a treble six-penny stamp paper, and sworn before him (who on reading the same, if he approves thereof, makes an order thereon), and may be as follows:

J. G. of, &c. the plaintiff, and J. W. of, Affidavit to hold to bail for an assault.
 &c. surgeon, severally make oath and say: and first, this deponent, J. G. for himself, saith, That in the month of *January* last past, the above defendant, *W. F.* Esquire, made an assault upon this deponent, and did beat and kick this deponent in so violent a manner on his groin, and other parts of his body, that this deponent has ever since that time been in great pain; and this deponent has at this time a rupture in his right groin, descending into the *scrotum*, occasioned by the kicks and blows which this deponent received from the defendant, whereby this deponent is rendered utterly incapable of getting his livelihood. And this deponent further saith, That, to the best of his knowledge, he never was subject to, or had a rupture, before the said assault was made upon him this deponent, as aforesaid; and that the said kicks and blows, given him by the said defendant, are the sole cause of the said rupture. And this deponent further saith, That he has applied to several eminent surgeons for advice to be cured of the said rupture, but has been informed by them that the same is incurable. And this deponent further saith, That he

L knows,

knows and is well acquainted with the defendant, and that the said defendant is in very good circumstances: and this deponent *J. W.* saith, That he hath viewed the other deponent's right groin, and that he has not a rupture in his said right groin descending into the *scrotum*, which, in this deponent's opinion is curable, and renders him quite capable of following his business.

Another

Deponent saith, that *A. B.* fourth mate of the ship called the *N. T.* came on board, on the 1st day of *January* 1781, came to this deponent in the deck of the said ship, at *London*, and without any just cause or provocation whatever, given to, or intended to be given to him, by this deponent, laid hold of this deponent's collar, and dragged this deponent on the floor of the ship, and with his fist, did with great force and violence strike this deponent many blows on his head, face, and body, by which this deponent lay senseless for some time, and that the said *A. B.* would have again beat this deponent, had not he been prevented by a person on board the said ship. And this deponent further saith, That his right cheek became greatly swollen and discoloured, and that he was in great pain for a considerable time afterwards, and that this deponent was rendered wholly incapable of performing his business on board the said ship. And this deponent further saith, That the said *A. B.* hath not as yet made him any satisfaction for the said assault, although he is in good circumstances; and he believes that

that the said *A. B.* soon intends leaving this kingdom.

P. C. like mariner on board the merchant ship the *W.*, *B. R.* commander, and *J. H.* late mariner on board the said ship, severally make oath and say; and first this deponent *P. C.* for himself saith, That in or about the month of *June*, in the year of our Lord 1781, as this deponent was doing his duty on board the said ship, in hawling up the range cable, *J. D.* mate of the said ship, struck this deponent several violent blows on his head, and several parts of this deponent's body, with his clenched fist; and this deponent saith, That having threatened the said *J. D.* when he this deponent came to *London*, he would endeavour to get satisfaction of him for such ill treatment; from which said expression, this deponent verily believes the said *J. D.* conceived great hatred and malice against this deponent, and often threatened this deponent, that he would have his life, if he should be hanged for it; and this deponent saith, That on the homeward passage from *Jamaica*, as this deponent was doing his duty, in hoisting out the boat belonging to the said ship, in order to tow the said ship, that she should not get foul of any other vessel, the wind being calm, as this deponent was lowering the said boat, the said *J. D.* hailed to this deponent to let go the said boat; and this deponent saith, That he, according to his said instructions, let the boat go, but not so soon as the said *J. D.* thought it might be done, whereupon the said *J. D.* came to this deponent, and, with

many opprobrious expressions and other ill usage, struck this deponent a violent blow on the right shoulder with a rope, called the gibb haulyards, about two inches and a half in circumference: and this deponent saith, That from the violence of the said blow the blood gushed from this deponent's shoulder; and this deponent saith, That the said *J. D.* struck this deponent several other violent blows, with the said rope, on his loins, shoulder, and other parts of his body, so that his shoulder and other parts of his body were bruised and swelled: and this deponent saith, That from the said ill treatment he remained ill about one month after, and that he still continues to feel pains occasioned by the said ill treatment, as aforesaid; and that he did not do or say any thing, or give any provocation whatsoever to the said *J. D.* to merit or deserve such ill treatment. And this deponent *J. H.* for himself saith, That he was present at the several times mentioned by the other deponent, and that he did see the said *P. C.* ill treated in manner and form as by him above deposed: and this deponent saith, That he did not see or hear the said *P. C.* say or do any thing, in this deponent's hearing, to deserve or merit such ill treatment: and this deponent *P. C.* for himself, further saith, That he has been informed, and which information this deponent believes to be true, that the said *J. D.* is a person of good circumstances, and well able to make satisfaction for the said ill treatment: and this deponent lastly saith, That he is informed that the said *J. D.* will soon

soon depart this realm; and unless he be held to bail, this deponent will be deprived of that satisfaction to which he thinks himself intitled by the laws of this country.

Process.

PROCESS is that by which a man is Process.

called into any temporal court, because it is the beginning or principal part thereof by which the rest is directed: or, if taken strictly, it is the proceeding after the original, before judgment. *Britton*, 138 *Crompton of Courts* 133. 8 *Rep.* 157. Process to call persons into court, &c must be in the name of the king; and if it issue from the superior court, it ought to be under the *teste* of the *chief justice*, or of the *senior judge* of the court, if there be *no chief justice*; and if it issues from any other court, it is to be under the *teste* of the *first* in commission. *Dalt. ch.* 132. *Finch.* 436. *Cro. Car.* 393.

The writ of *capias* must be returnable on As to the teste and return. a general return day, 1 *Barn.* 295.; and there must be *fifteen* days between the *teste* and return, *ibid.* 409. 2 *Wils.* 117.; but it may be *tested before the cause of action accrued in every case* (except where the plaintiff proceeds to an outlawry), and such *teste* must bear date in term. *Ibid.* 295. The *teste* may be amended, it being supposed the negligence of the officer of the court. 2 *Black.* 918.

Whereas by the ancient and fundamental laws The ancient law in proceeding, to *of this realm, in case where any person is sued,* implied, *arrests upon*

sums, on the
to express the
true value of
act in the
process.

*impleaded, or arrested by any writ, bill, or process
issued out of any of his majesty's courts of record
at Westminster, in any common plea, at the
suit of any one person, the true wife of
action, to do him wrong and procure an ex-
cessive damages, bill, or process, whereby the
debtor is put to great knowledge of the loss
of his estate, and his goods shall be taken
out, bill or process, may know how to take
security for the appearance of the debtor to
the justice, and his return for such arrears
may be made, and for all the use they be-
come indebted: and it is therefore a great com-
plaint that the people of this realm, that for divers
years now past, by the order of his majesty's
good justice the Lord Chief Justice, upon general
writs of Habeas Corpus, square claimant, bills
of Middlesex, and other bills, and
writs of the court of King's Bench and
Common Pleas, not expressing any particular
cause of action, and therefore kept pri-
soners for a long time for want of bail, bonds
and suits for arrears having the de-
mand in so great sums, that few or none have
dared to be security for the appearances of such
persons so arrested and imprisoned, although in
truth there hath been little or no cause of action,
and of others there are no such persons who are
named plaintiffs, but those arrests have been in my
times procured by malicious persons, to vex and
oppress the defendants, or to free from them un-
reasonable and unjust compositions for obtaining
their liberty, and by such evil practices many
men have been, and are daily undone, and destroyed
in their estates, without possibility of having
reparation, the actors employed in such practices
having*

having been (for the most part) poor and lacking
power, and their effort, so far as, that it hath
been, and is difficult to make the difference
or profits etc.

[illegible]

“ money of *England*, to be conditioned for
 “ such appearances; and that all sheriffs
 “ and other officers and ministers aforesaid,
 “ shall let to bail, and deliver out of prison,
 “ and from their, and every of their custodies
 “ respectively, all and every person and
 “ persons whatsoever, by them, or any of
 “ them arrested upon any such writ, bill, or
 “ process, wherein the certainty and true
 “ cause of action is not particularly ex-
 “ pressed, upon security in the sum of forty
 “ pounds, and no more, given for appear-
 “ ance of such person or persons so arrested,
 “ unto the said sheriff or officer aforesaid,
 “ according to the said statute in the said
 “ three and twentieth year of the reign of
 “ the said late king *Henry* the Sixth, in
 “ that behalf made and provided.” 13 *Car.* 2.
st. 2. c. 2. :

The name of
 the attorney
 to be written
 on every writ,
 &c.

By the 2 *Geo* 2. c. 23. *sect.* 22. it is enact-
 ed, “ That every writ and process for arrest-
 “ ing the body, and every writ of execution,
 “ or some label annexed to such writ or
 “ process, and every warrant that shall be
 “ made out upon any such writ, process, or
 “ execution, shall, before the service or
 “ execution thereof, be subscribed or in-
 “ dorsed with the name of the attorney,
 “ clerk in court, or solicitor, written in a
 “ common legible hand, by whom such
 “ writ, process, execution, or warrant re-
 “ spectively shall be sued forth; and where
 “ such attorney, clerk in court, or solicitor,
 “ shall not be the person immediately re-
 “ tained or employed by the plaintiff in the
 “ action or suit, then also the name of the
 “ attorney

“ attorney or solicitor so immediately retained or employed, to be subscribed, or indorsed and written in like manner; and that every copy of any writ or process that shall be served upon any defendant, shall, before the service thereof, be in like manner subscribed or indorsed with the name of the attorney or solicitor, who shall be immediately retained or employed by the plaintiff in such writ or process.”

By the 12 Geo. 2. c. 13. *sect.* 4. it is enacted, “ That from and after the 24th of June 1739, the not subscribing or indorsing the name of the attorney’s clerk in court, or solicitor, on any warrant that shall be made out upon any writ, process, or execution, shall not vitiate the same; but such writ, process, and execution, and all proceedings thereon, shall be as valid and effectual, notwithstanding such omission, as if the said recited act for regulating attornies and solicitors had not been made, provided the writ whereon such warrant is made out be regularly subscribed and indorsed according to the said act; and every sheriff or sheriffs, or other officer, who shall make out any warrant upon any writ, process, or execution, and shall not subscribe or indorse the name of the attorney, clerk in court, or solicitor, who sued out the same, shall forfeit the sum of five pounds, to be assessed as a fine upon such sheriff or sheriffs, or other officer by the court out of which such writ, process, or execution shall

The not indorsing the attorney’s name on warrants, upon writs, shall not vitiate.

Every sheriff to indorse the attornies names upon writs.

Process.

"shall issue; one moiety thereof to be paid
 "to his majesty, his heirs and successors,
 "and the other moiety to the person or per-
 "sons aggrieved by such omission."

No special writs shall issue in suits where the cause of action does not amount to 10*l*.

By the 5 Geo. 2. c. 27. *sess. 4.* it is enacted, "That from and after the end of this session of parliament, where the cause of action shall not amount to the sum of ten pounds or upwards in any superior court, or to forty shillings or upwards in any inferior court, no special writ or writs, nor any process specially therein expressing the cause or causes of action, shall be sued forth or issued from any such superior or inferior court respectively, in order to compel any person or persons to appear thereon in such court or courts; and all proceedings and judgments, that shall, from and after the end of this present session of parliament, be had on any such writ or process, shall be, and is hereby declared to be void and of none effect, and every attorney or officer of such court or courts, suing forth or issuing out such writ or process, shall forfeit the sum of ten pounds to the person or persons aggrieved thereby, who shall and may recover the same by action of debt, &c."

Penalty 10*l*.

Attorney's name must be indorsed on writ.

The name of the plaintiff's attorney must be indorsed on the writ; but if not indorsed on the sheriff's warrant, it will not vitiate it.
 2 Barnes 329.

The attorney's name must be put upon the copy of the process, or defendant may move that the proceedings be stayed. Barnes, 415.

George

Process.

George the Third, by the grace of God, of *Capias in*
Great Britain, France, and Ireland, King, *debt requiring*
 Defender of the Faith, and so forth, To the *bail.*
 Sheriff of *Middlesex*, greeting, We command
 you, that you take *John Denn*, late of *Westmin-*
ster, in your county, yeoman, and *Richard*
Roe, late of the same place, yeoman, if they
 shall be found in your bailiwick, and them
 safely keep, so that you may have their bod-
 ies before our justices at *Westminster*, on the
 morrow of *All Souls*, to answer *Richard Fenn*,
 in a plea, wherefore, with force and arms, the
 close of the said *Richard* at *Westminster* they
 broke, and other wrongs to him did, to the
 great damage of the said *Richard*, and against
 our peace; and also that the said *John Denn*
 may answer the said *Richard Fenn*, according
 to the custom of our court of Common-
 Bench, in a certain plea of debt upon demand,
 for one hundred pounds; and have you here
 this writ. Witness *Alexander Lord Lough-* *The penalty*
borough, at *Westminster*, the 9th day of *July*, *of the bond.*
 in the 23d year of our reign.

J. P. Attorney.

Indorse the attorney's name }
 and sum sworn on the back. } Oath for 50*l*.

Make a *præcipe* for the filacer thus :

Middlesex, to wit. *Capias* for *Richard Fenn* *Præcipe* for
 against *John Denn*, late of *Westminster*, in the the office.
 said county, yeoman, trespass at *Westminster*,
 debt for one hundred pounds, returnable on
 the morrow of *All Souls*.

J. P. Attorney.

Oath for 50*l*.

Inner Temple,
 6th Oct. 1783.

George

Process.

The like in
case.

George the Third, &c. To the sheriffs of *London*, greeting. We command you that you take *Richard Fenn*, late of *Westminster*, in your county, yeoman, and *Richard Roe*, late of the same place, yeoman, if they may be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at *Westminster*, on the morrow of *All Souls*, to answer *John Denn*, in a plea wherefore with force and arms the close of the said *John Denn*, at *London*, they broke, and other wrongs to him did, to the great damage of the said *John Denn*, and against our peace; and also that the said *Richard* may answer the said *John*, according to the custom of our court of Common-Bench, in a certain plea of trespass on the case, upon promises, to the damage of the said *John* of thirty pounds; and have you there this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the 23d year of our reign.

The præcipe. *London. Capias* for *John Denn* against *Richard Fenn*, late of *Westminster*, in the said county, yeoman, trespass at *Westminster*. Case for thirty pounds on promises returnable on the morrow of *All Souls*.

J. P. Attorney,
Inner-Temple,
6th Oct. 1783.

If the *capias* is sent into any other county, viz. *Oxford*, lay the trespass at *Oxford*, or any other town.

The like for
an assize.

And also that the said *Richard Fenn* may answer the said *John*, according to the custom of our court of Common-bench, in a certain

tain plea of trespass and assault to the damage of the said *John* of one hundred pounds.

N. B. You indorse the writ thus, " Bail by order of Mr. Justice Gould, for twenty pounds."

And also that the said *Richard* may answer In covenant, the said *John*, according to the custom of our court of Common-bench, in a certain plea of breach of covenant, to the damage of the said *John* of fifty pounds.

And also that the said *Richard* may answer In trover, the said *John*, according to the custom of our court of Common-bench, in a plea for the converting and disposing of the goods and chattels of the said *John*, of the value of fifty pounds.

And also that the said *Richard* may answer Detinue, the said *John*, according to the custom of our court of Common-bench, in a plea for the detaining of the goods and chattels of the said *John*, to the value of five hundred pounds.

And also that the said *John* and *Richard* may severally answer the said *John Doe*, according to the custom of our court of Common-bench, in a certain plea of trespass on the case, to the damage of the said *John Doe* of forty pounds.

And also that the said *John* may answer the said *Richard*, as executor of the last will and testament of *Simon Vowel*, deceased, in a certain plea of trespass on the case upon promises, to the damage of the said *Richard*, executor as aforesaid, of one hundred pounds.

And also that the said *John* may answer the said *Richard*, as administrator of all and singular

If two defendants, severally to be arrested.

As executor in case.

As administrator on bond.

regular the goods, chattels, and credits of *John Howet*, deceased, according to the custom of our court of Common-bench, in a certain plea of debt upon demand for two hundred pounds.

As assignees.

And also that the said *John* may answer the said *Richard* and *James*, as assignees of the estate and effects of *James Doe*, a bankrupt, according to the custom of our court of Common-bench, in a certain plea of trespass on the case, to the damage of the said *Richard* and *James*, assignees as aforesaid, of fifty pounds, and have there, &c.

The *capias* is printed, and may be had either at the filacers or stationers, for 2s. 7d. Take your affidavit, *præcipe*, and writ, to the filacers for the county, which see in p. 88. and if the affidavit has not been sworn before, your client must attend the filacer at the same time, to swear his affidavit, pay for the oath 1s. signing *capias*, 2s. 2d. which is 1s. for the original, and 1s. 2d. for signing the *capias*; the filacer then marks the *capias* with a stamp, which is called signing; take same to the seal-office, No. 3, Inner Temple Lane, to be sealed, pay for same 7d.; then get a warrant directed to your officer at the Sheriff's office, in *Hook's Court*, *Garfiter Street* (if in *Middlesex*); if in *London*, at the *Poultry* or *Wood Street* Compter; pay 4d. for same. If in any other county, to the under-sheriff in town.

The printed *capias* is made to run in the plural number, therefore if there is no more than one defendant to be sued, add *John Doe*
or

Process.

or *Richard Roe*, being the usual names inserted for that purpose.

George the Third, by the Grace of God, King of Great Britain, France, and Ireland, Defender of the Faith, &c. To the Sheriffs of London, greeting. We command you, that you take *John Denn*, late of London, merchant, and *Richard Fenn*, late of the same place, merchant, if they shall be found in your bailiwick, and keep them safely, so that you may have their bodies before our justices at *Westminster*, on the morrow of *All Souls*, to answer *A. B.* of a plea, wherefore with force and arms they broke the close of the said *A. B.* at London, and did other wrongs to him, to the great damage of the said *A. B.* and against our peace; and also that the said *John* and *Richard* may severally answer the said *A.* according to the custom of our court of Common-bench, in a certain plea of trespass on the case (or whatever the action is), on promises, to the damage of the said *A.* of sixty pounds; and have here this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the 23d year of our reign.

London. *Capias* for *A. B.* against *John Denn*, late of London, merchant, and *Richard Fenn*, late of the same place, merchant, trespass at London, case for sixty pounds, upon promises severally, returnable on the morrow of *All Souls*.

A. K. Attorney:

Oath for 15 *l.* against *John Denn*,

Oath for 15 *l.* against *Richard Fenn*.

If the defendant cannot be taken on the *capias* before the return thereof, then you may have

have a *Capias* by continuance, which is the same as the *Capias* already printed; and do not add the words ("as before we have commanded you"); but the only difference is in the *præcipe* to the filacer thus, *London, (H.) Capias by continuance for John Doe against Richard Roe, late of, &c. trespass at London, returnable on, &c.* The filacer charges signing 10 d. and seal 7 d.

It has been already observed, that the filacer formerly used to make out these writs upon receiving the *præcipe*, but as there is a great deal more business done now than formerly, the attornies now make them out for expedition themselves.

The day of signing the writ is to be set down thereon.

And by several statutes, "Every officer or clerk of this court, who shall sign any writ or process before judgment to arrest any person thereupon, shall, before the signing thereof, set down, upon such writ or process, the day and year of his signing the same, which shall be entered upon the remembrance, upon the forfeiture of ten pounds." 5 & 6 W. & M. c. 21. s. 3. 9 & 10 W. 3. c. 25. s. 42. 9 Geo. 2. c. 35. s. 32. *Pract. Reg. C. P.* 440, 441. *Barnes* 420.

If defendant lives in a liberty.

Non omittas

Non omittas capias.

If the defendant lives in any liberty where the sheriff, to whom the writ is directed, cannot enter, you may make out a *non omittas capias*, to empower him to enter into that liberty, and which is as follows.

George the Third, &c. To the sheriff of *Suffolk*, greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and

~~Præcipe~~

and take *John Priest*, late of *Thetford* in your county, yeoman, and *Richard Roe*, late of the same place, yeoman, if they shall be found in your bailiwick, and keep them safely, so that you may have their bodies before our justices at *Westminster*, on the morrow of *All Souls*, to answer *James Spratt*, in a plea, wherefore with force and arms the close of said *James* at *Thetford*, they broke and other wrongs to him did to the great damage of the said *James*, and against our peace; and also that the said *John* may answer the said *James* according to the custom of our court of Common-bench, in a certain plea of trespass on the case, upon promises to the damage of the said *James*, of one hundred pounds; and have you there this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the 23d year of our reign.

Norfolk (H.) Non omittas capias, for *James* Præcipe. *Spratt*, against *John Priest*, late of *Thetford*, yeoman, trespass at *Thetford*, case for one hundred pounds, on promises, returnable on the morrow of *All Souls*.

J. K. Attorney,

Oath for 50 l.

5th October, 1783.

Pay filacer signing 8s. 6d.; seal 1s. 2d.

Until very lately, if the defendant could not be found in the county where the *capias* issued, or that he did not live in the county where the plaintiff intended to lay his *venue*, in order to arrest him in another county, a writ of *testatum capias* issued, directed to that sheriff, wherein was recited the first writ; "and that it was testified, *testatum est*, "that the defendant lurks and wanders in

Until lately, if defendant did not live in the county where ~~venue~~ laid, a writ of *testatum* issued.

" his

his bailiwick, wherefore he is commanded
 "to take him as in the former *capias*." But
 the court, seeing the great inconvenience
 which the practisers were led into by this
 mode of proceeding, by putting in bail in the
 county where the *testatum* issued, instead of
 the county where the *capias* issued, they in
 Hilary term, 1781, made a rule upon the
 sheriffs to put upon their warrants from what
 county the *capias* issued; this not having the
 full effect intended, they in Hilary term
 1782, made the following rule:

Plaintiff may
 declare in a
 different
 county than
 that in which
 the arrest was
 made, and no
 waiver of bail.

*Whereas in actions where special bail may be
 required, in case the defendant resides in a dif-
 ferent county from that where the cause of action
 arises, and where it ought to be laid, and may on
 the part of the defendant be compelled to be tried,
 but on the part of the plaintiff to waive himself
 so to declare, it is necessary to sue a *capias* in the
 one county, and then a *testatum capias* into the
 other, and mistakes frequently happen by putting in
 bail with the filacer of the county where the arrest
 is, instead of that in which the first *capias* issued,
 by means whereof great expence and delays are
 often occasioned; "It is therefore ordered by
 "this court, that where an arrest shall be by
 "virtue of a *capias ad respondendum* in any
 "county, and bail shall be put in there-
 "upon, and the plaintiff shall think proper
 "afterwards to declare in a different county,
 "it shall not be deemed a waiver of bail:
 "but the recognizance of the bail shall be
 "as effectual for the benefit of the plaintiff,
 "and he may proceed thereon against the
 "bail in the same manner as if the plaintiff
 "had declared against the defendant in the
 "same*

in same county, in which the bail was put on him."

Which rule without doubt has taken away the writ of *testatum capias*; so that now, if the defendant cannot be found in the county where the first *capias* issued, the plaintiff's attorney, on taking an office copy of the affidavit, marked by the filacer for the county where the first writ issued, may make out a *capias* (as before) into another county; pay 1s. for the copy of the affidavit; stamp and paper 1s. 7d.; signing *capias* with the new filacer, 2s. 2d.; seal 7d.; without having any return of the first *capias*.

And the reason for having the *testatum* was, that the plaintiff lost his bail, if he declared in any other county than that in which the *capias* issued; *Pract. Reg. C. P.* 137.; so that if the defendant lived in any other county than that in which the plaintiff intended to try his cause, he was obliged to have a *testatum capias* to arrest him, and which he might issue in the first instance, though the suggestion of the *capias* having issued was but fiction; yet it being beneficial to all parties, was readily acquiesced in, being one in many instances to illustrate that maxim of law, that in *fictione juris consistit equitas*.

If the defendant lives in a county palatine, the writ in that case must be a *testatum capias*, directed to the Chancellor, or Chamberlain, &c. of the county palatine, as original writs do not run there, (for the court in this case does not immediately write to the sheriff, as in other cases): and the Chancellor makes

out his mandate thereon, if it is bailable to arrest the defendant, but not otherwise.

Directions to be observed in Writts directed to Chester, Lancaster, and Durham, being the County Palatine.

- Chester. To the Chamberlain of our county palatine of *Chester*, or to his deputy there, greeting, &c.
- Lancaster. To the Chancellor of our county palatine of *Lancaster*, or to his deputy there, greeting, &c.
- Durham. To the Reverend Father in God, by permission Lord Bishop of *Durham*, or to his Chancellor there, greeting, &c. And instead of saying in the writ, "Our county palatine," say, "Your bishoprick."

Totum capias to the palatine of Lancaster.

George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. to the chamberlain of our county palatine of *Lancaster*, or to his deputy there, greeting, we command you, that by our writ under the seal of our said county palatine, to be duly made, and to be directed to the sheriff of the said county palatine, you command the said sheriff, that he take *John Knott*, late of, &c. yeoman, and *Richard Roe*, late of the same place, yeoman, if they be found in his bailiwick, and them safely keep, so that you may have their bodies before our justices at *Westminster*, on the morrow of *All Souls*, to answer *Richard Fenn*, in a plea wherefore with force and arms the close of the said *Richard Fenn* at *London* they broke, and other wrongs to him did, to the great damage of the said *Richard Fenn*, and against our peace; and also that the said *Fenn* may answer the said *Richard*, according to the custom of our court of Common Bench, in a certain plea of trespass on the case

case upon promises, to the damage of the said *Richard Fenn* of fifty pounds; and whereupon our sheriffs of *London* returned to our justices at *Westminster*, at a certain day now past, that the said *John Knott* was not found in their bailiwick; whereas it is testified in our same court, before our justices, that the said *John* lurks and wanders in your said county palatine; And have there this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*; in the 23d year of our reign.

The like form will do for *Chester*; but for *Durham* say, "We command you, that under *Chester and Durham*,
 "the seal of your bishoprick, to be duly made
 "and directed to the sheriff of the county of
 "Durham, you cause the said sheriff to be com-
 "manded, that he take *John Knott*, late of,
 " &c." as in the former.

Cō. Pat. of Lancaster, testatum capias for Præcipe.
Richard Fenn against *John Knott*, late of, &c.
 yeoman, tres at *London*, and also for fifty-six
 pounds on promises returnable on the mor-
 row of *All Souls*.

Oath for 2 s. l. T. P. Attorney:

Take it to the filazers of *London* to sign; pay five shillings and sixpence, seal one shilling and twopence. If the defendant lives in any of the Cinque ports, as *Hastings, Romney, Hythe, Dover, or Sandwich*, it is thought that a *testatum* is necessary, notwithstanding the new rule of *Hilary* term, as there is no filazer for the cinque ports (though many make a *capias* only), in that case the direction of the writ must be, "To
 Cinque Ports.

Test. cap. to
Dover.

"the constable of our castle of Dover, or his
"deputy there." Vide 2 Barnard.

George the Third, by the grace of God, of
Great Britain, &c, to the constable of our
castle of Dover, or to his deputy, greet-
ing, We command you, that you take
John Denn, late of Dover, yeoman, and
Richard Roe, late of the same place, yeo-
man, if they shall be found in your baili-
wick, and them safely keep, so that you may
have their bodies before our justices at West-
minster on the morrow of All Souls, to an-
swer Richard Fenn, in a plea, wherefore with
force and arms the close of the said Richard,
at Maidstone, they broke, and other wrongs
to him did, to the great damage of the said
Richard, and against our peace; and also
that the said John may answer the said Rich-
ard, according to the custom of our court of
Common Bench, in a certain plea of trespass
on the case, upon promises, to the damage of
the said Richard of one hundred pounds;
and our sheriff of Kent, at a certain day now
past, returned to our justices at Westminster,
that the said John was not found in his baili-
wick; whereas it is testified in our same
court, that the said John lurks and wanders
up and down in your bailiwick; and have
you there this writ. Witness Alexander Lord
Dunblough, at Westminster, the 9th day of
July in the 33d year of our reign.

Præcipe.

Conque. Port. Test. capias for Richard Fenn
against John Denn, late of Dover, yeoman,
trespass at Maidstone, case for one hundred

"If you mean to lay venue in any other county, say,
at London, Westminster, &c."

power, or prothies, returnable on the mor-
row of *All Saints*.

Oath for 50s.

T. P. Attorney.

The Master for *Kent* signs this, pay him five
shillings and sixpence, one shilling and two-
pence fee.

CITIES and TOWNS Having a Sheriff Sheriffs.

Cities of		Cities of	
Bristol	} Have two Sheriffs.	Canterbury	} one Sheriff.
Gloucester		Exeter	
York		Litchfield, and	
Gloucester		Worcester	
Lindcolne		Towns of	} one Sheriff.
London		Kings, upon Hull	
Norwich		Southampton	
and		Princes, and	
Town of		Newcastle, upon Tyne	
Nottingham			

Common Process.

IF the cause of action does not require
bail, or you mean to serve the defendant
with process only, then the Stat. 12 Geo. 1.
c. 29. enacts, "That in all cases where the
cause of action shall not amount to ten
pounds or upwards, in any superior court,
the defendant shall not be arrested, but
shall be served personally with a copy of
the process." And by 3 Geo. 2. c. 27. Stat.
"That upon every copy of such process to
be served, shall be written an English no-
tice to such defendant, of the intent and
mean-

Common can-
pias to be
personally
served.

Common Pleas

" meaning such service, to the effect
" following: *E. A. B. you are served with this*
" *process, to the intent that you may, by your at-*
" *torney, appear in his Majesty's court of Com-*
" *mon Pleas, at the return thereof, being the*
" *day of _____ in order to your de-*
" *fence in this action.*" And for which notice
no fee shall be demanded.

The form of
a common
capias.

George the Third, by the Grace of God
of Great Britain, France, and Ireland, King,
Defender of the Faith, &c. to the Sheriff of
Middlesex, greeting: We command you, that
you take *Peter Roberts*, late of *Westminster*,
in your county, *mesuer*, and *Richard Ree*,
of the same place, yeoman, if they shall be
found in your bailiwick, and them safely
keep, so that you may have their bodies be-
fore our justices at *Westminster*, on the mor-
row of *All Souls*, to answer *John Denn*, in a
plea, wherefore with force of arms the close
of the said *John Denn* at *Westminster* they
broke, and other wrongs to him did, to the
great damage of the said *John*, and against
our peace; and have you there this writ.
Witness *Alexander Lord Loughborough*, at
Westminster, the 9th day of *July*, in the twen-
ty-third year of our reign.

This capias
will do in
every action,
a debt, de-
tinue, cove-
nant, &c. be-
ing only to
compel the
party to ap-
pear.

Notice. Mr. *Peter Roberts*,
You are served with this process, to the
intent that you may, by your attorney, ap-
pear in his Majesty's court of Common-
pleas, at the return thereof, being the 3d
day of *November* next, in order to your de-
fence
against husband and wife, say, *Appear for*
yourself, as a Sarah your wife.
fence

service in this action, and in the attorney's name, and the day fixed out, on the copy and writ.

In the filling up of process notailable, there are three things to be observed:

1st, In the writ, the very day of the return must be inserted, and it is usual generally on a writ to insert the words, *Rule of Court*, which must be directed to the defendant in the same name as the process, being so directed so expressed in the act of 1 Geo. 2. c. 11. the name of the defendant must be inserted as thus: "Her. A. B. You are served," &c. otherwise the writ may be quashed on motion. 1 Wils. 162.

Service on the return day is regular, 2 Wils. 372. and if served by a person who cannot read or write it is bad. *Rep. & Prac. C. P.* 34.

If the process be against baron and feme, if against baron service on the husband is sufficient for both, and if the husband does not appear for himself and wife, plaintiff may enter an appearance for both. *Barnes* 211. *q. b.* 293. 303. *off. edit.*

If the action be joint, against two or more persons, each must be served with a copy of the process.

Irregularity in service of process may be complained of any time before interlocutory judgment, but not after. *Prac. Rep.* 355. 2 *Barnes* 211.

If the process be directed into a county palatine, the defendant is to be served with a copy of the process, and not with the mandate.

Capias per continuance.

palatine, that mandate ~~thereupon~~ from the bishop, or chancellor, to the sheriff. *Barnes* 406.

If complaint is made of any irregularity of process or notice, he must ~~send~~ the copy to his affidavit, that it may appear to the court.

A copy of process may be served within a liberty. *Rep. & Pract. C. P.* 290.

A mistake in the process is cured by plaintiff entering an appearance, which was always been taken to be as effectual for that purpose, as if the defendant had entered the appearance. But it will be too late to apply after interlocutory judgment is signed, *Rep. & Pract. C. P.* 115.

After judgment signed, it is too late to complain of irregularity of process. *2 Barnes* 211.

Notice must be given on service of process, though the writ be special, and debt above ten pounds, *Rep. & Pract. C. P.* 249. Process served without any notice to appear is void. *Ibid.* 100.

Copy of process being tendered to defendant at his house, and he refusing to accept it, held leaving it there was good service. *2 Barnes*, 225. *N. B.* This means at the time.

Process delivered without the filacer's name to it held good. *Rep. & Cas. in pr.* 106.

Capias per continuance.

If the defendant cannot be taken on the first writ, or served with a copy of it, as the case shall be, and you don't propose to outlaw him, sue out a *capias* by continuance, and in that case you need not put the words, "as before we have commanded you," for the precept left with the filacer has the words "*capias per continuance*," which shews that it is the second writ; and so the same with the third.

third, or any other number of writs, unless you proceed to outlawry, in that case the words of the *alias* and *pluries* are made use of, pay signing writ. *feal 74.*

Capias ad respondendum, tested in *Trinity Term*, and returnable in *Hilary Term* following, missing *Michaelmas*, is void, and plaintiff is liable to trespass and false imprisonment; for he cannot justify under a void or irregular process. *3 Wils 341. 2 Black. Rep. 826.*

The court can amend *mesne process*, and also an attachment of privilege, though in its nature an original, *3 Wils. 456.*

Capias must be return-
ing one term
in the return
before the
next term

Court may
amend *mesne*
process, &c.

Special Bail.

BAILE, *Ballium* (from the French *bailler* which comes from the Greek *βαλλειν*, and signifies to deliver into hands), is used in our common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance at a day and place certain. *Bract, lib. 3. Traat. 2. c. 8.*

Definition of
bail.

The reason why it is called bail is, because by this means the party restrained is delivered into the hands of those that bind themselves for his forth-coming, in order to a safe keeping or protection from prison; and the end of bail is, to satisfy the condemnation and costs, or render the defendant to prison.

Bail

Special Bail.

Bail and mainprize are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, that they save a man from imprisonment in the common gaol, his friends undertaking for him, before certain persons for that purpose authorized, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way. 2 *Hdw. P. C. c.* 88. 4 *Inst.* 180. The chief difference is, that a man's *mainperners* are barely his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a *Sunday*, confine him till the next day, and then render him. 6 *Mod.* 231. *Lord Raymond* 706, 12 *Mod.* 275.

No attorney
to be bail.

By rule *Mich.* 6 *Geo.* 2. "It is ordered
"by the lord chief justice, and the rest of
"the justices of this court, that from and
"after the last day of this term, no attorney
"of this or any other court, or any person
"practising as such, shall be bail in any
"suit or action depending in this court."

An attorney
may be bail
in render,

Notwithstanding this rule, it has been held, that an attorney, though he cannot be allowed to justify, yet he is sufficient bail to surrender without justification. *Jackson & Trinder*, 2 *Black. Rep.* 1180.

By rule *Hil.* 7 *Geo.* 2. "It is ordered,
"that no sheriff's officer, bailiff, or other
"person concerned in the execution of pro-
"cess, shall be permitted or suffered to be-
"come bail in any action or suit depending
"in this court."

It

Special Bail

It hath been determined, that a summoning officer to the sheriff of *Middlesex*, for warning juries, &c. and who was security to the sheriff for his brother, and formerly had been a sheriff's officer for serving writs and making arrests, is within the above rule; for the rule is founded upon principles of prudent jealousy, and therefore the court would not set a precedent for evading it. *Bollard v. Pritchard*, 2 *Black. Rep.* 779.

A summoning officer within the above rule.

Persons outlawed after judgment cannot be bail.

A Frenchman who had resided in England twelve years, in a house at 45*l.* per annum, as a factor for *Birmingham* goods, and sworn himself worth 2000*l.* in the bank of *Paris*, but had no considerable property in England, was admitted to justify as bail for 180*l.* the defendant being himself a foreigner. *Andrew Quésnell*, the other bail, not understanding English, *Anselme* was sworn to interpret, and upon examination was also justified. *Christie v. Fillene*. 2 *Black. Rep.* 1323.

A Frenchman permitted to justify.

It is no objection to bail that he lives within the verge of the court, without other suspicious circumstances attend it. 2 *Black. Rep.* 956.

Bail who live in the verge of the court good.

The defendant having been arrested, and put in bail to the sheriff, you must, if the writ of *capias* be in *London* or *Middlesex*, put in bail above within four days (exclusive of the appearance day, or *quarto die post* of the return of such writ); and to prevent a mistake of names, the best way is to get a short copy of such writ at the filacer's or sheriff's office, and the sum sworn to, or the bail bond

Within what time to put in bail in *London* and *Middlesex*.

Capias

bond may be assigned. *Rule Hil. 9 Ann.*; but if the last of the said four days happen on a Sunday, bail may be put in the next day, and will be regular.

How to put in bail in town on a capias. Go to Mr. Roberts, the filacer, No. 4. *Flare Court, Temple*, with an abstract of the writ, the names and additions of the bail, who will enter them in his book kept for that purpose; and he, or his clerk Mr. Evans, will attend at the judge's chambers with the bail, and take the recognizance; pay him in term time 12d. in vacation 19s.; if taken at the judge's house pay 3s. 4d. more: but if the filacer cannot attend, the recognizance may be taken in his absence on a double 12d. stamp parchment, called a *bail piece*, before a judge, upon bringing a true abstract of the writ. *Rule Hil. 8 Geo. II.* the form of which will be as follows:

Bail piece.

In the Common Pleas.	
At Michaelmas Term, in the twenty fourth year of the reign of King, George the Third.	
J. D. Attorney for Defendant.	London (H) Capias against Richard Fenn, late of London, yeoman at the suit of John Derr, his 100l. per pro nuses returnable on the Morrow of All Souls
	Affidavit for 50l
Bail are, Richard Knox, of Fleet Street, London, dwelling, and	
Taken and acknowledged, &c.	John Mann, of Gutter Lane, Cheapside, London silver smith
The Defendant bound 11 100l.	
Each of the Bail in 50l	

If the defendant is not present.

If the defendant be not present, and does not enter into the recognizance, then the bail are bound in double the sum the cause of action is sworn to amount to.

The

The usual practice has been, that only two persons become bound in the recognizance; and it has been held, that notice given to justify three is irregular. *Allen v. Key*, 2 Black. Rep. 1122, Two only to become bail, and notice of three to justify is irregular.

In this case you deduct from the fees to the filacer the stamp for the bail piece, 2s.

" You (*naming the defendant, if present*) do acknowledge to owe unto the plaintiff 100l.; you (*naming the bail*) do severally acknowledge to owe unto the plaintiff the sum of 50l. a piece, to be levied upon your several goods and chattels, lands and tenements, upon condition, that if the defendant be condemned in the said action, he shall pay the condemnation money, or render himself a prisoner to the Plaintiff for the same; and if he fail so to do, you (*naming the bail*) do undertake to do it for him." R. 5 W. & M. The condition of the recognizance.

When the bail is put in, give notice in writing to the plaintiff's attorney as follows:

In the Common Pleas,

John Denn, Plaintiff,

Between and

Richard Fenn, Defendant.

Take notice, that special bail was this day put in with the filacer for the defendant in this cause, before the Honourable Mr. Justice Gould, at his chambers in, *Serjeants Inn, Chancery Lane, London*, and the names are *Richard Knox*, of *Fleet-street, London*, jeweller; and *John* Notice of Bail.

~~John Jones~~ of ~~Golden Lane, Cheapside, London,~~
jeweller, dated the 10th day of November,
1782.

To Mr. G. H. Attor-
ney for plaintiff.

Yours, &c.

J. K. attorney for
the defendant.

Inner Temple.

If the bail
taken by the
sheriff be put
in above, yet
they may be
excepted
against.

If they are the same as are bail to the she-
riff, there is no necessity to say so in this
court, *because they may still be excepted against*
(though the plaintiff's attorney does not rule
the sheriff), and may be compelled to justify
by the following rule of M. 6 Geo. 2.
Whereas it has been usually practised in this court,
in all cases where bail bonds have been taken, that
if the same bail taken by the sheriff be put in
above, that such bail shall not be excepted against,
but shall stand good and be absolute; And, Where-
as such practice hath been found to be inconve-
nient in many instances, " It is therefore or-
" dered by the Lord Chief Justice, and the
" rest of the justices of this court, that from
" and after the last day of this present term,
" in all cases wherein bail bonds shall be
" taken, and the same bail is put in above,
" the plaintiff may except against such
" bail."

And if they
do not justify,
or add others
who do,
plaintiff may
proceed on
the bail bond.

And unless the bail so excepted against
shall justify themselves, or other bail be
added, who shall justify, within the time li-
mited by the rules of the court, the plaintiff
may take an assignment of the bail bond, and
proceed thereon, notwithstanding he excepted
to the same persons when put in as bail
above. *Barnes 63. 74.*

Exception to
be in 20 days.

If the plaintiff be dissatisfied with the bail
above, he may except against them at any
time

Special Bail.

time *within twenty days* after notice given of putting in the same. *R. 5 W. & M.*

Exception must be in writing, entered in Exception, the filacer's book, or the bail-piece, and then notice must be given to the plaintiff's attorney, as follows: "*Denn against Fenn. I Notice.*"
 "have excepted against the bail put in for
 "the *defendant in this cause.* Yours, &c.
 "J. D. attorney for the plaintiff."

If the exception is made in term, and in time, wherein notice may be given to justify, the bail must justify themselves in court (or by consent of the plaintiff's attorney before a judge), within *four days* after such exception taken. *Trin. 3 & 4 Geo. 2.* But if the exception be delivered so late in the term that there is not four days left, or in the vacation, then the notice to justify will be for the *first day* of the *next term*; and notice must be given of such justification *two days, exclusive* of the day it is given; and if *Sunday* intervenes, then *three days* notice; as for instance, bail is put in the *10th* of *November*, exception taken the *11th*, the notice must be given on the *13th*, to justify the *15th*, and *Friday* is good notice for *Monday*, but *Saturday* for *Monday* is not. When to justify.

By the rule *Trin. 3 & 4 Geo. II.* "It is Bail to be perfected in four days after exception."
 "ordered, that from and after the last day
 "of this term, if special bail put in by the
 "defendant be excepted to, the defendant
 "shall perfect his bail within four days
 "after exception taken; in default whereof
 "the plaintiff shall be at liberty to proceed
 "on the bail bond."

N

If

Special Bail

If the same bail put in are to justify, then the notice of justification will be thus :

In the Common Pleas.

Denn v. Fenn.

Notice of just-
ifying the
same bail.

Take notice, that the bail already put in for the above defendant in this cause, and of whom you have had notice, will, on *Friday* the 14th of this instant *November*, justify themselves in open court, as good and sufficient bail for the said defendant, dated this 12th day of *November*, 1783. Yours, &c.

Mr. J. K. Attorney J. B. Attorney for the
for Plaintiff. Defendant.

How to justify in court. The evening pre-
ceding the day of justification, an affidavit of
the above notice is to be made on a treble
sixpenny stamp paper ; ; which is to be sworn
before a judge ; pay for the oath 2s. ; then
speak to the filacer, Mr. *Roberts*, to attend
with the bail-piece, or book in which the
names of the bail are entered, at *Westminster*,
pay him for same 5s. 4d. ; give your affidavit
to a serjeant, with instructions thereon in-
dorsed, " To move to justify the within
" bail," and a fee of 10s. 6d. : have your
bail ready at the sitting of the court, who
will be called for, and when sworn, pay
the fees of the court to one of the clerks, viz.
5s. 6d. This being done, in the evening go
to the Secondaries Office, No. 1, *King's*
Benb Wall's, in the *Temple*, and get your
rule for the allowance of bail drawn up ; pay
him 4s. 6d. ; serve the plaintiff's attorney
with

Special Bail

with a copy; and it is a rule in this court, in all cases, to shew the *original rule* at the same time.

In the Common Pleas,

John Denn, Plaintiff,
Between and
Richard Fenn, Defendant.

J. G. Clerk to E. H. of, &c. attorney for the defendant in this cause, maketh oath and faith, That he did, on the 23d day of *November* instant, personally serve J. K. the plaintiff's attorney, with a true copy of the notice hereto annexed, Affidavit of the service of notice of justification.

If you serve the servant of plaintiff's attorney or clerk, say, "*Served Mr. J. K. the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk, or servant of the said J. K. at his house in Serjeant's Inn, in Fleet-street, London.*"

To save expence of serjeant and court fees, the attorney for the plaintiff frequently accepts of the bail being justified before a judge; in this case the plaintiff's attorney attends in person, or gives a note to the filacer of such his consent; then take the filacer to the judge's chambers, with the bail, who will justify before the judge. Pay the plaintiff's attorney 10s. 6d. filacer 5s. 4d. How to justify at chambers.

But if the same bail that are put in are not to justify, and you mean to add and justify fresh bail, in that case, before the notice to justify such bail is given, "*you must add the bail to that already put in, before the time*" Of adding bail.

Additional
bail must be
put in before
notice of jus-
tification can
be given.

Additional
bail are to
justify, though
not excepted
to.

*that notice for the justification of such new bail
is delivered, as will appear by the following
rule of Mich. 18. Geo. 3. "It is ordered by
the court, that from and after the last day
of this present term, no person who shall
become special bail for any defendant or
defendants, in any action or suit depend-
ing in this court, shall be permitted to
justify themselves in open court as good
and sufficient bail for any such defendant
or defendants, unless such persons did ac-
tually become bail for such defendant or
defendants, before the time that notice for
the justification of such bail was delivered
to the plaintiff's attorney or agent."*

If after exception to the bail put in, the
defendant wishes to add further bail, the ad-
ditional bail must justify themselves in court,
*within the four days after such exception, with-
out waiting for a new notice; for this court
does not oblige the plaintiff to make excep-
tion to such new bail; and in default of
justifying, he may proceed on the bail bond.*

By this rule, it doth not strike me that
there is any necessity for giving notice of the
adding such bail separately, but a notice that
they are added to the bail already put in,
and that they will on such a day justify, will
do.

In the Common Pleas.

John Denn, Plaintiff,
Between and

Richard Penn, Defendant.

Notice of ad-
ditional bail
must be put
in two
days

Take notice, that *Aaron Moses*, of *Duke's
Place, London*, merchant, and *George Duke*,
of *Hatton-Street, near Holborn*, in the county
of

Special Bail

of *Middlesex*, broker, did this evening add themselves to the bail already put in for the defendant in this cause, before the honourable Mr. Justice *Nares*, at his Chambers in *Serjeants-Inn, Chancery-lane, London*; and that they the said *Aaron Moses* and *George Duke* will, on *Monday* next, justify themselves in open court as good bail for the said defendant. Dated the day of *November*, 1783.

Your's, &c.

To Mr. G. H. Attorney J. K. Attorney for
for the Plaintiff. the Defendant.

If you add but one to the bail already put in, and he with one of the other justifies, then your notice will be as follows, after such one has been added and put in before the judge according to the new rule.

Take notice, that *E. F.* of, &c. was last night added to the bail already put in for the defendant in this cause, with the filacer, before the honourable Mr. Justice *Nares*, at his Chambers in *Serjeants-Inn, Chancery-lane, London*; and that he, together with *John James*, one of the bail already put in for the said defendant, and of whom you have had notice, will, on *Friday* the 14th day of this instant, *November*, justify themselves in open court as good and sufficient bail for the said defendant. Dated, &c.

Notice of
adding and
justifying one
bail.

Take the added bail to the judge's chambers, with the filacer; pay him for adding 7s. 4d. and then you proceed to justify as before.

After many nugatory notices of justification, the defendant's bail appeared in court

Bail need not
to justify, but
order to for-
to render.

Special Bail.

to justify. One was allowed, and time given to enquire after the other. On the same night the same bail, one not being justified, surrendered the defendant in discharge. *Crole* moved for an attachment against the Sheriff, for not bringing in the body. *Walker* shewed for cause the surrenders; to do which the bail need not justify: and of that opinion was the court, and discharged the rule, upon *Crole's* consenting to pay the cost of the frivolous notices to justify. *Milne v. Morris.* - *Black. Rep.* 1179

Upon the 14th of *November* 1783, bail above was put in, and referred to upon the day of justification; the bail brought the defendant into court, and prayed that they might be at liberty to surrender defendant without justifying. Court held, that the bail might do this, and allowed the surrender; and Mr. Justice *Gould* said, that two persons, not worth a groat, might put in bail for the purpose of rendering; Mr. Prothonotary *Dickins* mentioned two cases wherein the above practice was established in this court, viz. *Jackson v. Morris*, and *Richardson* against same. *M. T.* 1783. *Wardle* one, &c. v. *Bowland*.

But bail surreptitiously put in, cannot surrender the defendant.

But in two cases wherein the Sheriff was ruled the 11th of *November*, to bring in the body of the defendants, it appeared, that upon the 14th bail were justified and allowed in court: on the 19th of *November*, the court was moved to set the allowance aside, the bail being surreptitiously put in and justified; which rule, on the 27th of *November*, was made absolute. In the mean time, on the 21st of

same

Special Bail.

same month, the bail surrendered the defendant. The court held, that as the bail was put in surreptitiously, they were as no bail, and therefore could not surrender, and made absolute the rule for an attachment.

Jackson v. Morris 2 Black. Rep. 1179.

The defendant had changed his attorney without leave of the court, and gave notice of justifying by his new attorney, held irregular, and that plaintiff is not bound to accept such notice. *Kaye v. De Mattos*. 2 Black

Cannot give notice by a new attorney to justify, unless he is changed.

Rep. 1323

One who is bail cannot be a witness in the cause for his principal, therefore, if defendant should have occasion to examine one of his bail as a witness, he must make an affidavit that such bail is a material witness for him in the cause, and thereupon move the court, that such bail may be struck out of the bail-piece, on adding and justifying another in his stead. *Barnes* 69. *Str.* 406. *Burr*.

Bail cannot be a witness for the defendant,

Rep. 133. And as bail are liable to costs, they cannot be said to be evidence for the plaintiff, but if he means to make them as such, he may in the first instance object to their being on the bail-piece; or in the next, may exonerate them at his own expence; for I presume they may object to being sworn, as being liable to the debt and costs, and therefore interested in the event of the suit.

nor for the plaintiff.

Of putting in Bail in the Country, and transmitting it.

By the 4 & 5 W. & M. c. 4. "The chief justice, &c. of the different courts, and

Special Bail.

" chief baron, shall, or may, by one or
" more commission, from time to time,
" empower such and so many persons, other
" than *common attorneys* and *solicitors*, as they
" shall think fit and necessary, in all and
" every the usual shires and counties, to take
" and receive recognizance of bail, as any
" person or persons shall be willing or de-
" siring to acknowledge in any action or suit
" depending in the said courts, in such
" manner and form, and by such recog-
" nizance or bail-piece, as the justices and
" barons have used to take the same, which
" shall be transmitted to the court where
" such action shall be depending, who, upon
" affidavit made of the due taking thereof by
" some credible person, at the taking there-
" of such justice or baron shall receive the
" same."

Sec. 2. " Power is given to the justices
" and barons to make rules for justifying
" such bail, by affidavit duly taken before
" the said commissioners, who are hereby
" empowered and required to take the same,
" and also to examine the sureties upon oath,
" touching the value of their respective es-
" tates." The third clause, " impowers
" justices of assize, in their circuit, to take
" such bail in a similar manner." The fourth
and last section, makes it felony for one to be
bail in another's name.

How long de-
fendant has to
put in bail in
a country
cause.

The defendant hath *eight days*, exclusive of
the appearance day, in any other city and
county (than *London* or *Middlesex*), to put in
special bail; and that no bail-bond taken
thereon, by virtue of process issued out of
this

this court, shall be put in suit, till after the eight days, exclusive of the appearance day, of any return, upon pain of having all proceedings set aside with costs. *Rule Hill. 9 Ann.*

As for example, if the writ of *capias* be returnable on the morrow of *All Souls*, being the 3d of *November*, the defendant hath till the 14th to put in bail, and the bond cannot be put in suit till the 15th. *Barnes 77, 78.* If on the morrow of *Saint Martin*, being the 12th, the defendant has till the 24th (*Sunday* being the last day). If in eight days of *Saint Martin*, then on the 20th. In fifteen days of *Saint Martin*, then on the 6th of *December*; so that it is eight days after the appearance day, or *quarto die post* of every return.

And this bail must be so taken, that it may be allowed by a judge conditionally, and filed with the filacer within the eight days after the appearance day of the return of the writ.

The bail-piece is filled up by the defendant's attorney, in the form mentioned in *How to* p. 174.; then take the bail to a commissioner, in bail who will take the recognizance, for which pay 2s.; and it is usual for the attorney at the same time to have an affidavit ingrossed on treble 6d. stamp paper, of the justification of the bail, which may be sworn before the commissioner who took the same, who is by the act of 4 & 5 W. & M. c. 4. impowered to swear the same, which was made for the purpose to prevent the bail a further journey. As soon as this is done, prepare also an affidavit of the due taking of the bail, which must be sworn before a commissioner (not the person

Special Bail

person who took the bail), which is engrossed likewise on a treble 6d. stamp paper; this being done, annex the same to the bail-piece, and send the whole to the agent in town, so that he may get it filed within the eight days,

In the Common Pleas.

John Denn, Plaintiff,
and

Richard Fenn, Defendant.

Affidavit of the due taking of bail, in the country, to be sworn before a commissioner, not the person authorized to take same.

Thomas Jones, of *Newport*, in the county of *Bucks*, gentleman, maketh oath, and saith, That the recognizance of the bail or bail-piece hereunto annexed, was duly acknowledged by *John Brown*, of *Newport* aforesaid, grocer, and *James Rogers*, of the same place, farmer, the bail therein named, before *E. F. Esquire*, the commissioner, who took the same in this deponent's presence, the 10th day of *November* instant.

T. J.

Sworn, &c.

Also it is usual for the attorney in the country, to send to his agent, at the same time, an affidavit of the justification, In the Common Pleas.

John Denn, Plaintiff,

Between and

Richard Fenn, Defendant.

Affidavit of justification.

John Brown, of *Newport*, in the county of *Bucks*, grocer, and *James Rogers*, of the same place, farmer, bail for the defendant in this cause, severally make oath and say; and first this deponent *John Brown*, for himself saith, That he is a housekeeper in *Newport* aforesaid,

N. B. This may be sworn before the

Special Bail.

aforesaid, and that he this deponent is worth two hundred pounds over and above what will pay all his debts; and this deponent, *James Rogers*, for himself saith, That he is a housekeeper at *Newport* aforesaid, and is worth two hundred pounds over and above what will pay all his debts.

commissioners who took the bail.
Barnes 67.

Sworn, &c.

Upon receipt of the bail-piece, and affidavit of the caption, the agent then applies to a judge for his *allocatur*; pay 5*s.* in term; in vacation 12*s.*; then file the same with the filacer of the county wherein the bail is taken; pay in term 6*s.*; in vacation 6*s.*; the agent for the defendant then gives notice thereof to the agent in town for the plaintiff, which will be as follows; and note, amongst fair practisers, the copy of the two affidavits, are sent with such notice.

In the Common Pleas.

John Denn, Plaintiff,

Between and

Richard Fenn, Defendant.

Take notice, that special bail was on the 11th day of *November* instant, put in for the abovenamed defendant, before *E. F. Elquire*, a commissioner appointed to take special bails in and for the county of *B.* and the names are *John Brown*, of *Newport*, in the county of *Bucks*, grocer, and *James Rogers*, of the same place, farmer, which have been allowed by the honourable Mr. Justice Gould; and the bail-piece, together with the affidavit of the due taking thereof, is filed with the filacer

Notice of
 bail being
 filed.

Special Bail

filacer of the said county, Dated the 14th day of November, 1783.

Your's, &c.

To Mr. P. C, attorney, J. K. Agent for
or Agent for Plaintiff. Defendants.

N. B. The agent may, if he thinks proper, file the affidavit of justification, which is usually sent with the bail-piece (for fear there should not be time, after exception, to get it so as to justify) at the same time with the filacer, who takes two shillings.

This being done, the agent in town may enter his exception *within twenty days*, which may be done at the filacer's under the bail-piece; and notice must be given of same to the agent in town, who has *four days* afterwards to *justify* such bail by *affidavit*.

N. B. The same form does as in town with respect to the exception; but in the notice of justification, you say, "*The bail will justify themselves by affidavit.*"

The plaintiff's counsel may oppose these bail in the same manner as if they attended in person, and the judges may disallow the same; for they are only conditional till the twenty days expire.

If the justification is insisted upon, affidavit must be made of service of the notice, and indorse thereon thus: "*Denn v. Fenn,*
"*Mr. Serjeant Bolin-half a guinea, to move*
"*to justify the within bail by affidavit.*" Speak the over-night to the filacer, to bring the affidavit to *Westminster*; pay him his fee, three shillings and four pence. Attend the next day, and pay the court fees, three shillings and sixpence. But amongst fair agents

this is very seldom done, as they usually accept the justification by filing the affidavit with the filacer, if not done at the time of filing the bail-piece; pay consent ten shillings and sixpence; but if they justify, the rule for the allowance ought to be drawn up, and served on plaintiff's agent.

When the act of the 4 & 5 W. & M. was made, in order to regulate the taking of bails before commissioners, it became necessary for this court, in the fifth year, to make the following rule:

Before any bail shall be taken by virtue of the said act, a true copy of the writ, on parchment, to which the defendant is to put in bail, shall be brought to the commissioner before whom such bail is to be taken; and thereupon the recognizance or bail-piece shall be fairly drawn and ingrossed on the said parchment copy, in this or the like form, as the case shall be, viz.

That a true copy of the writ be on parchment, and the bail-piece thereon ingrossed.

The bail, *John Denn*, of *Blackbarnesley*, in the parish of *Settle*, in the county of *York*, Gent. and *Richard Fenn*, of the same, Gent.

Recognizance.

A. B. attorney for } The defendant in 20 l.
the defendant. } Each of the bail in 10 l.

Taken and acknowledged the 10th day of *March*, in the year of our Lord 1692, conditionally, before me, *A. B.* one of the commissioners.

If the defendant be not present, then the bail are usually bound in double the sum in the writ, otherwise only single.

Defendant not present, bail in double the sum.

The

Special Bails

The condition of which said recognizance shall be to this effect, viz.

The condition of the recognizance.

You (naming the defendant, if present) do acknowledge to owe unto the plaintiff twenty pounds; and you (naming the bail) do severally acknowledge to owe unto the same person the sum of ten pounds a-piece, to be levied upon your several goods and chattels, lands and tenements, upon condition that if the defendant be condemned in the said action, he shall pay the condemnation, or render himself a prisoner to the Fleet for the same, and if he fail so to do, you (naming the bail) do undertake to do it for him.

Affidavit of the due taking.

That the affidavit of the due taking of every such bail shall be made, either before some judge of the Common-pleas, to whom the bail shall be transmitted, or before some person who shall have power to take affidavits in matters and causes depending in the said court.

When to be transmitted.

N. B. The bail given must be filed within eight days after the quarto die post of the return of the writ, or the bond may be assigned

R. Hil. 9 Ann.

That all bails taken by any commissioner within the distance of forty miles from the cities of *London* and *Westminster*, shall be transmitted to the lord chief justice of the court of Common-pleas, or to one of the justices of the said court, within ten days after the taking thereof; and all bails taken by any commissioner above the distance of forty miles from the said cities of *London* and *Westminster*, shall be transmitted within twenty days after the taking thereof, unless all the said justices shall be in their circuits, and then as soon as any one of them shall be returned to *London* out of his circuit.

Commissioners to keep books to enter bails.

Also every commissioner is to have a book, kept purposely for entering exactly the

Index

● ● ●

三

By rule *Hist. 6 Geo. 1.* "It is ordered, Transmittage
 " That all bails taken by commissioners, and entering;
 " pursuant to the act of parliament for of bail taken
 " taking special bails in the country, shall in the coun-
 " be transmitted to the lord chief justice, try.
 " or to one of the justices of this court,
 " viz. every bail taken within forty miles
 " of *London*, within ten days after the cap-
 " tion thereof, and every bail taken above
 " forty miles from *London*, within twenty
 " days after the caption thereof; unless all
 " the said justices shall be in their circuits;
 " and then as soon as any one of them shall
 " be returned to *London* out of his circuit,
 " being the time prescribed by the or-
 " ders of this court to be observed by the
 " commiſſion-

Special Bail.

“ commissioners, and after such transmiss-
“ sion, shall be forthwith delivered to, and
“ filed with the proper officer, to be entered
“ upon a record, or otherwise it shall be as
“ no bail; and the plaintiff is at liberty to
“ proceed on the sheriff's bond, as if no
“ such bail were ever put in; and the de-
“ fendant, in case he be admissible to plead
“ to the original action, shall not be admit-
“ ted so to do, unless he first pay the full
“ costs to the plaintiff for the prosecution
“ on the bail-bond; and plead as of the
“ time when the bail should have been duly
“ entered.”

Filing bail
given after
transmitted.

By rule, *M. 13 Geo. 1.* “ It is ordered,
“ That from and after the last day of this
“ present term, all bails taken before com-
“ missioners in the country, and transmitted
“ to, and allowed by the lord chief justice,
“ or one of the justices of this court, shall
“ be delivered to the clerk of the said lord
“ chief justice, or such other judge as shall
“ allow the said bail; which clerk shall take
“ the fees due to the proper officer for the
“ entry thereof; and shall forthwith deliver
“ the said bail to be filed, and pay the said
“ fees to such proper officer.”

One bail
esteemed as
no bail.

Two persons at least must become bail
for the defendants; the putting in one bail
only is esteemed as no bail, not even suffi-
cient to ground a surrender upon, though it
be done immediately; and the plaintiff, in
such case, may proceed on the bail-bond,
notwithstanding the surrender. *Barnes* 60,
61, 67, 105.

If

If bail is to be put in upon a *testatum* How to put in bail on a testatum capias. *capias* into the counties *palatine*, or the *Cinque ports* (for in no other county need there be one), then proper care must be taken, that such bail-piece and affidavit be filed with the *filacer* of that county wherein the *action* is laid, and not the *filacer* of the county *palatine*; as for instance, the *capias* being directed to the *bishop* of *Durham*, the trespass laid is in *London*, *Middlesex*, or any other county, in that county where the trespass is laid, the *capias* is supposed to issue, and with the *filacer* of that county the bail-piece must be filed, otherwise it is as no bail: and by a late rule the sheriff, or other officer who grants the warrant, is (for the preventing of this mistake) to indorse on his warrant where the *capias* issued; and the bail-piece on a *testatum* does not differ from the other, (put in the margin) *County palatine of Chester, testatum capias, against, &c.*

A *capias* indorsed for bail being issued, Bail although put in before the return of the writ, held to be a return. defendant, before the return of the writ, and before he was arrested, put in bail before a judge, and gave notice thereof to plaintiff's attorney. Plaintiff regarded not the notice, but caused defendant to be arrested, and he being in custody, moved for a *superfideas*, and had a rule to shew cause. It appearing that plaintiff had not excepted against the bail within twenty days after notice thereof, the court was of opinion that the bail ought to stand; and the rule was absolute. *Barn. 81.*

If bail excepted to do not justify, he But who do should get his name struck out of the bail-
O to justify &c
by the court

piece, otherwise he is not exonerated.
1 *Black. Rep.* 462.

The plaintiff has his election, either to take an assignment of the bail-bond, if bail is not put in in due time, or proceed to rule the sheriff to return the writ, and bring in the body; the latter of which will be treated of, under a separate head.

For settling
the practice
in relation to
prosecution
on bail-
bonds.

By rule *Hil. 9 Ann.* " It is ordered, That
" no bail-bond taken in *London* or *Middle-*
" *sex*, by virtue of any process issuing out
" of this court, shall be put in suit till af-
" ter four days, exclusive of the appearance
" day of every return, upon which the said
" process shall be returnable; and that no
" bail-bond taken in any other *city* or *county*,
" by virtue of such process, shall be put in
" suit till after *eight days, exclusive of the ap-*
" *pearance day of any such return*, upon pain
" of having all proceedings made upon
" such bail-bonds to the contrary thereof
" (upon motion made to this court for that
" purpose) set aside, with costs."

When regu-
lar.

If the writ be returnable on the morrow of *All Souls*, and in *London* or *Middlesex*, the bail-bond cannot be taken until the 11th of *November*, if in the country, not till the 16th; so that the *four* and *eight* days must completely expire.

Sheriff, on
request, to
assign bail-
bond to the
sheriff;

By *Stat. 4 & 5 Ann. c. 16. s. 20.* it is enacted, " That the sheriff, at the request
" and costs of the plaintiff, or his lawful
" attorney, shall assign to the plaintiff the
" bail-bond, by indorsing the same, and at-
" testing it under his hand and seal, in the
" presence of two or more credible wit-

Special Bail.

14

“ nesses; which may be done without any
 “ stamp, provided the assignment, so in-
 “ dorfed, be duly stamped before any action
 “ brought thereon; and if forfeited, the ^{who may}
 “ plaintiff may, after such assignment, bring ^{bring an ac-}
 “ an action thereupon in his own name, ^{tion in his}
 “ and the court may give such relief to the ^{own name.}
 “ plaintiff and defendant in the original
 “ action, and to the bail on the said bond,
 “ as shall be agreeable to justice and rea-
 “ son; and each rule of court shall have
 “ the effect of a defeasance to such bail-
 “ bond.” *Ibid.*

Before taking the assignment of the bond, Plaintiff's at-
 the plaintiff's attorney should be satisfied ^{torney should,}
 that the bail taken by the sheriff are good; ^{before assign-}
 for by accepting of such assignment he can- ^{ment, be sa-}
 not resort to the sheriff, unless by action at ^{tisfied with}
 law, which is too hazardous to bring for ^{the sufficiency}
 such insufficiency. ^{of the bail.}

If the bail are not put in, or if excepted ^{How to apply}
 against, and do not justify in due time, the ^{for the assign-}
 plaintiff's attorney in *Middles* & applies to the ^{ment of the}
 under-sheriff, at his office in *Look's Court*, ^{bond in town.}
Cusfiter-street, or if in *London*, to the second-
 ary of the Compter where the writ was
 taken, *viz.* the *Poultry* or *Wood-street*, for
 the assignment of the bond, who, on pay-
 ment of five shillings, assigns the same.
 But if the writ be in the country, then he ^{In the coun-}
 must apply to the under-sheriff there, who ^{try.}
 sends same to his agent, the usual charge is
 six shillings and eight pence, and one shil-
 ling for postage.

Action thereon. Before any writ is made out, ^{Action there-}
 the assignment must be taken to the stamp-^o

office, and stamp with a double six-penny stamp. And *N. B.* the plaintiff in the writ is usually named "*Assignee of the sheriff,*" and the action must be brought in the same court wherein the original writ was sued out, for that court only hath jurisdiction and cognizance of the action. 3 *Wils.* 348. *Barnes* 117.

And where you proceed on the bail-bond, all proceedings in the original action ceases. Proceed exactly the same as in common cases against the principal and his bail; and the writ may be laid in any county. *St. 127. 2 Ld. Ray.* 1455.

Attorney
waives his
privilege by
entering into
bail-bond.

If an attorney be in the bond, the action must be brought in the same court where the process was issued, for by his entering into such bond, he waives his privilege, whether sued jointly or severally. *Barnes* 117. And the bail in such bond are not to be held to special bail, but served with process only.

After excep-
tion bail
added, but
did not justify.
Proceedings on
the bond re-
gular.

After an exception to bail put in before a judge, defendant added bail, but did not justify in court, pursuant to the rule for perfecting bail in four days. Plaintiff proceeded on the bail-bond without excepting against the bail, and held regular. *Donne* 71.

Cannot take
affidavit of
bond, if
plaintiff does
not declare
there.

When plaintiff does not declare in due time, viz. before the fourth day of the third term inclusive, he cannot take an affidavit of the bond: if he does, the court, on motion, will stay the proceedings. *Strover v. May* 1 and 2. *Blair* 127. 876.

*Terms on which the Court will stay Pro-
ceedings on the Bond.*

IF the plaintiff has taken an assignment of the bond, and defendant would wish to stay the proceedings thereon, he should first put in his bail, and give notice to perfect the same as before directed; then take out a summons before a judge, to shew cause why the proceedings should not be staid; who will, if plaintiff has not lost a term, on defendant's consenting, to put the plaintiff in the same situation in which he would have been in, had the bail been put in in due time, and paying the costs, order the proceedings to be staid; but if the plaintiff has lost a trial, the judge will order the bail-bond to stand as a security. If the plaintiff is irregular in taking the assignment of the bond, then the court must be moved on an affidavit of the facts.

If the delay of proceeding happen through the plaintiff's own neglect, as where the defendant died before judgment could be obtained against him in the original action, the court will stay the proceedings on the bond. *Barne's 99.*

If the delay happen by neglect of plaintiff's proceeding, and the defendant die, all proceedings on the bond will be set aside.

If the court stay the proceedings on the bond, the defendant is, not at liberty to plead in abatement, but must plead in chief. *Salk. 519.*

Cannot plead in abatement, as it stays on the bond.

But having justified, the defendant, moved, after the last sitting within term, to stay the proceedings himself in proceeding.

to trial, the court will stay the proceedings on the bond.

proceedings on the bail-bond, upon payment of costs. The plaintiff insisted, that the action being in *Middlesex*, he had been delayed a trial, and that the bond ought to stand as a security; but it appearing that no declaration, *de bene esse*, had been delivered in the original action, the plaintiff had delayed himself, and rule made absolute. *Barnes* 84.

Bail cannot be permitted to pay, without paying the costs against the principal when they apply to stay.

In debt on the bail bond, the defendant moved to stay the proceedings, having paid his principal debt, and his own costs, all but 40s. which he had tendered: but the court, on considering precedents held, that the costs of the action against the principal, and the other bail, must also be paid before proceedings could be staid. 2 *Black. Rep.* 816. *Walker v. Carter*.

Defendant in the original action dying, before plaintiff could have judgment against him in the original action (although the bond was assigned), yet the court ordered proceedings to stay.

The original action was in *Michaelmas Term*, and for want of bail, the bond was assigned in *February*. After which defendant died, and bail moved to stay proceedings, plaintiff not having got judgment on the bond before defendant's death. On hearing counsel, the court ordered proceedings to be staid on payment of costs, being of opinion, that the matter never was carried further than the bail-bond standing as a security for what should be recovered on the original trial, and that the suit would have been at an end, the plaintiff might have proceeded more speedily, and if inconvenience happened to him, it is his own fault. *Barnes* 61, 52,

Of compelling the Sheriff to return the Writ, and bring in the Body of the Defendant.

IT appears by the 13 *Ed. 1. c. 39.* and 23 *H. 6. c. 10* that the sheriffs of the different counties were very tardy in returning their writs in due time; and by the former statute it is ordained, "That a complaint should be made to the justices, and a writ should go unto them, to enquire whether such writ was executed or not, and if executed, and not returned, the demandant should have his damages awarded"

By the latter, "If the sheriffs return upon any person, *cepi corpus*, or *reddidit se*, they shall have the bodies at the return of the said writs."

Notwithstanding which, sheriffs, bailiffs of liberties, and their deputies, delayed execution of process, and return thereof, for preventing of which a rule was made, *Mich.*

15 *Eliz. f. 7.* "That all sheriffs, under-sheriffs, or sheriffs deputies, shall return all writs and common processes that shall be delivered to their hands, or of record, and deliver them or send them returned into this court, within eight days next after they be returnable, upon pain of every such sheriff or under-sheriff, that shall offend, to pay 40s. at the least."

By rule *M. 1654. f. 2.* "For prevention and remedy of delays and abuses of sheriffs, under-sheriffs, bailiffs of liberties, Sheriffs, &c. not executing processes, or not returning and the,

Of compelling the Sheriff

“ and their deputies, and other bailiffs of
 “ sheriffs, &c. in execution of process and
 “ writs, That if it shall appear that any
 “ such officer shall wilfully delay the execu-
 “ tion or return of any process or execution,
 or taking un- “ or shall take or require any undue fees
 due fees, or “ for the same, or shall give notice to the
 giving of n- “ defendant, thereby to frustrate the execu-
 dant notice, “ tion of any process or writ, or having le-
 or detaining “ vied money, shall detain it in their hands
 money levied, “ after the time of the return of their writs,
 “ besides the ordinary course of amercia-
 “ ments (for contempt or misdemeanor ap-
 to be punish- “ appearing), an attachment, information,
 ed as the case “ commitment, or fine, to be as the case
 requireth. “ requireth: and this, as well in the case of
 “ a late sheriff, or person before mention-
 “ ed, as of them at present in office.”

Sheriff not
 returning
 process in six
 days after
 service, with
 a rule to that
 purpose, to
 pay the costs
 occasioned by
 the neglect

By rule 17. 8 Geo. 1. it is ordered, “ That
 “ from and after the last day of this present
 Term, if any sheriff, under-sheriff,
 “ &c. or any of the officers or persons hav-
 ing the return of any process issuing out
 of this court, or of any precept or warrant
 thereupon, shall neglect or refuse to re-
 turn the same within six days after service
 “ of a rule of this court for that purpose,
 “ such sheriffs, under-sheriffs, and every
 “ other of the above named officers or per-
 “ sons, shall be liable to pay the costs occa-
 “ sioned by such neglect, to be taxed.”

Sheriffs of
 London
 made return
 within four
 days.

By rule 11. 7 Geo. 2. Notice is hereby given,
 “ that from and after the last day of this
 “ present term, every rule to be made for
 “ the return of the county of *Middlesex*, and
 “ the sheriffs of *London*, to return writs, or
 “ bring

“bring into the court the body or bodies of
“any defendant or defendants, will be made;
“for such sheriff and sheriffs to return such
“writs, and bring into court such body or
“bodies of such defendant or defendants,
“within four days next after service there-
“of.”

But with respect to country sheriffs, the County six days.
rule is still six days to return the writ, and to bring in the body.

If the plaintiff be dissatisfied with the bail given to the sheriff, he may, on the first day of the term, or *quarto die post* of any other return, get a rule from the secondary to return the writ, pay 4s. 6d. serve copy on the deputy secondary (if in *London*) at the office where the warrant is taken out, viz. the *Poultry* or *Woodstreet*; if in *Middlesex*, at the Public Office in *Took's Court*, *Curfitor-street*: if in the country, on the under-sheriff there; at the same time shew the original rule, as you are in this court to swear particularly to that (on which copy put your officer's name who arrested the defendant), and at the expiration of the rule, go to the *Custos Brevium*, No. 3, *Brick Court*, *Temple*, search for the return, if the sheriff has returned *cepi corpus* on it, and bail is put in, in due time, first except against them (but not otherwise); then get an extract of the writ and return from the *Custos Brevium*, pay 4d. take same to the filacer, who will give you his rule for the sheriff to bring in the body pursuant to *R. Trin. 2 W. & M.*; pay 2s. 11d.; take that to the secondary's office, and they will make out a rule peremptorily on the sheriff to bring in

If the plaintiff be dissatisfied with the bail, he may have a rule to return the writ, and afterwards a rule to bring in the body.

Of compelling the Sheriff

in the body, if in *London* or *Middlesex*, within four days; *country*, six days; pay 5s; serve the sheriff with a copy, and shew the original; and if the bail do not justify on the day the rule expires, *viz.* four days (or six) next after the service, make an affidavit of the service of the rule, ingross same on treble sixpenny stamp paper, swear same before a judge, then give it to a serjeant, with instructions thereon indorsed, “to move for an attachment against the sheriff, for not bringing in the body, pursuant to the rule annexed,” the form of which affidavit is as follows:

Affidavit to move for an attachment for not bringing into court the body.

John Taylor, clerk to *Samuel Gill* of *Chancery Lane*, *London*, Gentleman, attorney for the plaintiff in this cause, maketh oath and saith, That he did on the day of instant, personally serve Mr. *Hill* *, who acts as deputy seconday of *Hoodstreet Compter*, with a true copy of the rule hereto annexed, and at the same time shewed the said Mr. *Hill* the said original rule, and this deponent further saith, That bail above was put in by the said defendant, but that the same is not perfected.

In the evening get the rule drawn up at the secondary's for attachment, which, for when done, make out same yourself, as follows. pay for rule 5s 6d.

Attachment

George the Third, by the Grace of God, of *Great Britain, France, and Ireland*, King, Defender of the Faith, &c. To the coroner

* If in *Middlesex*, on Mr. *Benson*, Mr. *Burchell*, or Mr. *Carr*.

of our city of *London* *, greeting : We command you, that you attach Sir *Robert Taylor*, knight, and *Benjamin Cole*, Esquire, sheriffs of our said city, so that you may have *them* before our justices at *Westminster*, on *Thursday* next after the morrow of *All Souls*, to answer us of and concerning those things which on our part shall at that time be objected against *them* : and that you have there then this writ ; witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the twenty-third of our reign.—

Lim

him

N. B. Put the words of the rule at the foot of the attachment, viz. For not bringing into court the body of the defendant, &c. In-
gros the attachment on a 2s. 6d. stamp parchment ; take it to the prothonotary's, and pay signing 1s. 4d. seal 7d. ; then carry same to Mr. *Beach* the coroner ; pay him two guineas, and he will, on delivery of your bill of costs, at the same time get the money of the sheriffs : warrant 2s. 6d. If it is in *Middlesex*, take same to the coroner Mr. *Unwin*, with bill of costs ; pay him 2l. 4s. 6d. Upon the return, if he does not pay the money, you may have a rule for him to return the writ of attachment, which get at the secondary's, and serve him with copy. If he does not return it, make affidavit thereof, and the court will grant an attachment, and order it to be directed to elisors, two or more persons named for that purpose to be chosen by the prothonotaries.

* It in *Middlesex*, say coroners of our county of *Middlesex*.

Of compelling the Sheriff

If no bail is put in at all, either by the sheriff or defendant, then after the rule to bring in the body is expired, make affidavit thereof in this manner :

Affidavit
when no bail
is at all put
in,

I. W. clerk to *S. G. of Chancery Lane, London*, attorney for the plaintiff in this cause, maketh oath and faith, That he did, on the _____ day of _____ instant, personally serve Mr. *Hill*, deputy secondary of the *Woodstreet Compter*, with a true copy of the rule hereto annexed, at the same time shewing him the said original rule; and this deponent further saith, That no bail above has been put in for the said defendant, he this deponent having this morning searched with the proper officer for that purpose.

If the sheriff does not return the writ pursuant to the rule after service thereof, then, upon search thereof made at the *Custos Brevarium*, you make an affidavit of the service, and move the court for an attachment for not returning the writ pursuant to the rule, which affidavit will be as follows:

In the Common Pleas,

Job: Denn against *Richard Tenn.*

Affidavit to
move for an
attachment
for not re-
turning the
writ.

John Taylor, clerk to Mr. *A. B.* attorney for the above named plaintiff, maketh oath and faith, That a writ of *copias ad respondendum* was regularly issued out of, and under the seal of this honourable court, returnable on the morrow of *All Souls* last past, directed to the present sheriffs of the city of *London*; and that this deponent did, on the 6th day of *November* instant, serve Mr. *Pugh*, who is or acts as the deputy secondary of the *Poultry Compter*,

Compter, with a true copy of the rule hereto annexed, and at the same time shewed him the said original rule; And this deponent further saith, That he did this morning search with the *Custos Brevium* of this court, amongst the file of writs as of this term, for the return of the said writ of *capias ad respondendum*, but that the same was not filed with the said *Custos Brevium*. Pay terjeant's fee 10s. 6d. rule s. 6d.; and then make out the attachment as before.

Proceedings against the late Sheriff.

IF the sheriff is out of office after he has *N. B.* He is taken the defendant, then you get a rule in not liable to the same manner as before from the secondary's office for him to return the writ, be called up- on 6 months after he is out of office. *Stat.* which if he returns *cepi corpus*, you will, on *et fine. Stat.* searching with the *Custos Brevium*, get a note 20 Geo. 2. of same, pay *ad*; carry it to the alacer for 6s. 37. him to bring in the body, pay 10s. *ad*; then take same to the secondary's office, and get a rule peremptory to bring in the body, pay 5s.; give copy thereof on the deputy sheriff, now for matters here to be dealt not perfected, same as before.

N. B. This is a much more expeditious way of proceeding against the sheriff than by a writ, as in the king's road.

On the 7th of November 1783, the late Attachment field of *John* was ruled to return the writ of *capias ad respondendum*, the late sheriff returned the defendant taken, whole in the body body then had ready. On the 13th or November on the present he is, instead

Of compelling the Sheriff

of the late
sheriff.

When a rule was served on the present sheriffs to bring in the body, which they did not, and an attachment was granted. Now, upon motion to set aside the attachment, it appeared that the old sheriffs returned the writ *cepi corpus*, and also there was returned upon the writ thus by the new sheriffs. — “ This writ, as above indorsed, was delivered to us the undersigned now sheriffs, by the above named late sheriffs, at the time of their going out of office,” that therefore the rule ought to have been upon the old sheriffs, to bring in the body. Upon shewing cause, it was contended, that the new sheriffs having made the indorsement upon the writ as before stated, they had made themselves answerable for the body. but the court held, that the indorsement merely shewed how the writ came into the hands of the present sheriffs, and therefore set aside the attachment. Serjeant *Groff* for the plaintiff, Serjeant *Beaton* for the sheriffs. *13 Term. 24 Geo. 3. 1 Le. 81, 82 it one, 3 C. v Turner.*

The sheriff, in order to save himself, may put in bail for the defendant (against his consent), upon receiving the rule to bring in the body, and *N. B.* The rules ought to keep pace with the defendant's time, so that the second rule should not be brought in before the four days are expired, in which the defendant has to put in his bail above, pursuant to the rule of court, and exception entered.

Attachment
set aside
against the
sheriff, for

In a late case in this court between *Spicer* and *Innes*, the writ was returnable in fifteen days of *Le ter*, the rule to return the

, WRIT

writ was served on *Wednesday*; the sheriff re-serving the
turned and filed it on the *Saturday* night; on rule to bring
Monday the plaintiff's attorney, without wait- in the body,
ing till the defendant had put in bail (*i. e.* before time
till *Monday* evening, which time he had by expired for
the rule of the court), obtained a rule to putting in
bring in the body, and served it on the she- bail above.
riff on the morning of *Monday*: the defend-
ant put in bail *Monday* evening, and notice
was given; no exception was made, but the
defendant not having justified within the four
days, an attachment was moved for and ob-
tained, and on motion to set it aside, it was
held irregular, because bail was put in in
time, and plaintiff's attorney ought to have
excepted against the bail, before he had
obtained the rule to bring in the body. *Last*.
Term. 23 *Geo.* 3. Serjeant *Grosse* for the plain-
tiff, Serjeant *Bolton* for the sheriffs.

N. B. If the sheriff puts in bail, he must
justify before a render can be made.

Common Appearance.

A Common Appearance to a *capias* is en- Common ap-
tered with the filacer of the county, pearance.
wherein the writ is directed, and the note is
in this form:

London: Appearance for *John Denn*, late of *Precept for*
London, yeoman, ats. *Richard Fern*, to a *cap* earance.
pias, returnable on the *Morrow* of *Mich* & ouls.

J. P. Attorney.

This is wrote on a piece of unstampt pa-
per, and filed with the filacer, who enters
the same in a book kept for that purpose,

~~Common Appearance.~~

pay him 2s. 6d. viz. 1s. 6d. for duty, and 1s. for the entry; but if there are more than one defendant, he takes 4d. more for each.

By the *stat. 5 Geo. 2. c. 27.* "Where the defendant is served with a copy of the process, he must cause a *common appearance* to be entered on the return, or within *eight days after such return.*"

N. B. This means from the *return* of the *capias*, and not the *quarto die post*.

If defendant does not appear, plaintiff may.

"And in case the defendant shall not appear *within eight days after the return* of such writ or process, the plaintiff, upon making and filing an affidavit of the *personal service* of such writ or process, may enter a *common appearance* for the defendant, and proceed thereon, as if such defendant had entered the same." *Stat. 12 Geo. 1. c. 29.*

Affidavit of service to be first made.

If the defendant does not enter his appearance within eight days next after the return of the writ, the plaintiff must cause the following affidavit to be made by the person who served it, which may be sworn before a judge, commissioner, filacer, or his deputy; but in town mostly before the filacer, *stat. 12 Geo. 1. c. 29. 5 Geo. 2. c. 27.* and is to be filed *gratis*. The same form will do, only add after the return of the writ, "*filed according to the statute.*"

In the Common Pleas,

John Dunn against *Richard Lenn.*

Affidavit to be made on a written ed. n. m. p. p. p. t.

John Legg, of, &c. clerk to *J. P.* attorney for the above named plaintiff, in oath and faith That he did, on the 11th day of November instant, personally serve the above defendant with a true copy of a writ of *ca-*

Common Appearance.

pias ad respondendum, which appears to this deponent to be regularly issued out of this honourable court, and returnable before his Majesty's justices at *Westminster*, on the morrow of *All Souls*; under which said copy was written an *English* notice to the said defendant of the intent of such service, pursuant to the statute in that case made and provided.

John Clegg.

Sworn, &c.

If baron and feme are sued, the baron must appear for himself and wife.

An appearance cures all errors and defects in process. *Barnes* 163. 167. 424. 451. 3 *Wils.* 141.

If a writ be served on defendant by a wrong name, and he files appearance in his right name, he may be declared against by his right name; therefore, if you are aware of that mistake, stay till he appears before you file the declaration.

It plaintiff enters an appearance for the defendant, before the time the defendant has to enter his appearance is expired, the defendant must complain of the irregularity before judgment signed. *Barnes* 242. 255 296.

Irregularity of plaintiff entering appearance for defendant to be complained of before judgment.

That any attorney of either bench accepting a warrant to appear, or subscribing a process, &c. be compelled to cause appearance, or be liable to an attachment, or put out of the roll, as the case requires. *R. M.* 1654.

Attorney not appearing according to undertaking, to be attached.

Common Appearance.

In what Cases a Common Appearance will be ordered.

Common appearance ordered.

AN *ac-etiam* was put into the *capias*, which was indorsed for bail, but no *ac-etiam* was put on the *precipe*; therefore common appearance ordered. *Barnes* 117. One affidavit against several defendants upon several debts, common appearance ordered, *Barnes* 70; but refused in *Trinity Term*, 1783, where only one was arrested. Where an action is vexatious. 2 *Black. Rep.* 809. If the wife be arrested on process against the husband and her, she shall be discharged; but the marriage must be clearly made out, 2 *Barnes* 80. as by producing a copy of the register or certificate, and proving that her coverture was open and notorious. But it is said, if both are arrested together, she shall not be discharged. *Pract. Reg.* 93. *Barnes* 67. q. A

Court will not discharge a feme-covert on a common appearance, unless coverture be notorious.

In a late case the court said, they would not discharge a feme-covert, when sued as a feme sole upon a common appearance, unless defendant lives with her husband, and the coverture be open and notorious. 2 *Black. Rep.* 903.

Fugitive.

So if defendant produces a duplicate of his discharge as a fugitive, he shall be discharged on a common appearance. *Barnes* 81. 85. 89.

Bankrupt.

So if defendant a bankrupt, produces his certificate allowed, confirmed, and inrolled. But the court will not discharge a bankrupt on

Declaration.

on common appearance, when the commission appears to have been grossly fraudulent.
2 *Black. Rep.* 725.

Declaration.

IN declarations, repetitions of the original writ to be avoided, and only the nature of the action to be repeated. Upon an original *clausum fregit*, to mention the place certainly. *R. Mich.* 1654. *s.* 16, 17. In covenant, to repeat no more of the deed than necessary; in slander, long preambles to be forborn, and no more inducement than what is necessary for the maintenance of the action; but when it requires a special *inducement*, or *colloquium*. *Ibid.*

Unnecessary length of declaration to be forborn.

How in covenant.

Slander.

That in actions upon general statutes, the declaration not to repeat the statute, but to conclude against the form of the statute in such case made and provided; as in case of debt, upon *Stat. Ed.* 6. for tythes; the 2 *H.* 8. for maintenance; and 21 *Jac.* of monopoly. *Ibid.*

How upon general statutes.

That action of debt upon a judgment had in the courts of *Westminster*, to recite only the judgment; but if a judgment had by or against an executor or administrator, debt thereupon, to repeat the declaration and judgment *Ibid.*

Upon judgment at Westminster.

When the declaration is drawn, it is to be ingrossed on treble penny stamp paper; charge on the back thereof 4d. *per sheet* (seventy-two words), and duty 3d.; warrant, in *debt*, *trespass*, and *detinue*, 4d., in other

How to be ingrossed, and to charge.

Declaration.

actions 8*d.*; and if the plaintiff's attorney enters appearance, according to the statute, 5*s.* 10*d.* more.

When defendant appears.

Delivering, or filing it. If the defendant's attorney has appeared or put in bail, it must be delivered to him; whereupon he must pay for the same duty and warrant; or on refusal by him, or his clerk in his absence (or if his abode be unknown), it may be left in the Prothonotaries office, on payment of 2*s.* a count, or 8*d.* per sheet; and then, on notice thereof to the defendant or his attorney (and from the time of giving said notice, and not before, the declaration is well delivered), and on rule to plead being given, judgment for want of plea may be signed; and no plea may be received till the declaration is taken out of the office.

Where plaintiff appears for defendant, the declaration shall be left in the office, and notice given.

When appearance is entred according to the statute. In all cases where a copy of the process of this court is served upon any defendant or defendants by the plaintiff's attorney, pursuant to the act for preventing frivolous and vexatious arrests, the plaintiff's attorney, in such case, shall leave a copy of the declaration in the office, and likewise give notice thereof to the defendant or defendants, by delivering an *English* notice, written in a secretary hand, to such defendant or defendants, or by leaving the same at the last, or most usual place of abode of such defendant or defendants, signifying the nature of the action, at whose suit it is prosecuted, and in whose office such declaration is left. And in case such defendant or defendants, after such notice given, do not plead by the time the rules

After such notice, the declaration shall be deemed well de-

Declaration.

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rules for pleading are out, the plaintiff, in such case may sign his judgment (a rule to plead being first given), without any other or further calling for a plea; and thereon give notice of executing his writ of enquiry, either by delivering notice in writing to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; which shall be sufficient notice to such defendant or defendants, of the time of executing such writ of inquiry, *R. Mich. 1 Geo. 2.*

Formerly, if the plaintiff declared in *London* or *Middlesex*, upon process returnable the first or second return of any term, and defendant lived within twenty miles of *London*, declaration should be delivered with notice to plead in four days, and if the plaintiff declared in any other county, or the defendant lived above twenty miles from *London*, declaration should be delivered to plead in eight days. But now, by rule of *Trinity Term*, 8 *Geo* 3. "It is ordered, That upon all process sued out of this court, returnable the first, second, or third return of any term, if the plaintiff declares in *London* or *Middlesex*, and the defendant lives within twenty miles of *London*, the defendant shall plead within four days after such declaration delivered, with notice to plead accordingly without any imparlance. And in case the plaintiff declares in any other county, or the defendant lives above twenty miles from *London*, the defendant shall plead within eight days after the declaration delivered, with notice to plead accordingly."

Declaration.

"ration delivered, with notice to plead accordingly, without any imparlance; and that all such declarations may be delivered *de bene esse*."

Of delivering Declaration on Procefs, returnable on any other Return.

IF the procefs be returnable on any other return, the defendant is then intitled to an imparlance; and in such case, notice to be given for the defendant to plead within the first four days of the next term.

There are two ways of delivering a declaration; the one on the appearance day of the return of the writ; or before the time for appearance or perfecting bail by the defendant, which is called *de bene esse*, or conditionally (until appearance entred, or special bail put in and perfected); and the other after appearance is entred, either by or for the defendant, or after he has put in and perfected special bail, which is called *in chief*, because in that case the notice is to plead without condition within the time limited; and now the usual way is to file the declaration *de bene esse*.

When it may be delivered de bene esse. Upon procefs returnable the first, second, or third return of any term, the declaration may be delivered *de bene esse*, at the return of the procefs, with notice to plead if in *London* or *Middlesex* (and the action beailable); in four days, if it is notailable in eight days. But if the plaintiff declares in any other county,

Declaration.

county, then within eight days after declaration delivered, either where there is *special* or *common* bail demanded. *R. Trin* 8 *Geo.* 3.

A declaration cannot be delivered *de bene esse*, so as to charge the defendant with paying for it, till the *appearance day* of the return. 2 *Black Rep* 749.

The 10th of *November*, defendant was served with writ returnable the 12th, not intitled to be paid for declaration till the 15th; for the four days of grace are always allowed to defendant to make an end of the cause by payment or otherwise. 2 *Black. Rep.* 749.

When it is delivered in chief. If a declaration be delivered after special bail put in and perfected, or after appearance entred by or for the defendant, such declaration is delivered in chief; and he has, if the declaration be delivered, *four days before the end of the term*, in which the process is returnable, and the action be laid in *London* or *Middlesex*, *four days* to plead; if in any other county *eight days*.

The rule to plead in this court is reckoned to be inclusive; as for instance, if the rule be given the 6th of *November*, it is out the 9th, and judgment may be signed on the 10th, in the afternoon, if demand is made in time.

The delivery of a declaration, before special bail is put in, is a waiver of the bail; and if before bail be justified, it is an acceptance of them, unless it is delivered *de bene esse*. *Lister v. Wainhouse.* 2 *Barnes* 66.

Declaration.

If a declaration is delivered *de bene esse*, a rule to plead may be given the same day; but if the plaintiff demands a plea in case the process is bailable; before bail is filed, it is a waiver of the exception to the bail.

If a declaration be delivered *de bene esse*, on or before the appearance day of the return of the writ, the defendant is intitled to four days time to plead from the appearance day. If delivered after the appearance day, then to four days after the delivery. *2 Black. Rep.* 1243.

When plaintiff shall lose his bail.

Plaintiff shall lose his bail, when he declares differently from his writ; as for instance, if he sues out a writ in his own right, and declares as executor, the court will vacate and discharge the bail, and order plaintiff to accept of a common appearance, *3 Wils. 61.*; so if the *action* be in case, and he declares in debt.

If plaintiff declared in any other county than that in which the writ issued, he lost his bail, but now it is otherwise.

A declaration cannot be delivered against one of two defendants, till both appear.

Formerly, on a *clausum fregit*, with an *action* in debt, case, &c. if the plaintiff declared in any other county than that in which the writ issued, he lost his bail, but by rule of *Hilary* term 1782, he may now declare in any county, and the bail shall stand good.

A declaration cannot be delivered against one of two defendants, until they both put in bail; for if one puts in bail, and the other is not arrested, before you can declare, you must outlaw the other: in such case remember, at the end of the second term, to get a rule for time to declare in the cause, or you will lose the bail, as plaintiff without that rule is out of court.

A dē

A declaration cannot be delivered against one of two defendants till both appear, or one appears, and the other is outlawed. *Knight v. Barker, and others. 2 Black Rep. 7:9.*

To ascertain the practice of this court concerning the delivery and demand of declarations and pleadings, and the serving of notices of all kinds, "It is ordered by this court, That from henceforth all declarations and pleadings shall be delivered, all such demands made, and all notices given, before nine of the clock in the evening."

That upon all process returnable the first or any other return in any term, the plaintiff shall have liberty to the end of the next ensuing term, to deliver his declaration to the defendant's attorney, or of leaving the same in the office; and the defendant's attorney, having entered his appearance with the proper officer, as of that term in which the process is returnable, and at the end of the ensuing term, or in four days after the end thereof, having given a rule to declare in the proper office, and having called on the plaintiff's attorney or clerk in court (if he can be found), the defendant any time in the vacation of such ensuing term, after the rule for declaring is out, may sign his *nonpross* for want of a declaration, and not afterwards; and the plaintiff shall not, without leave of the court, have any longer time to declare in, than as above said, other than the time to be limited by the defendant's rule; any rule or practice to the contrary hereof notwithstanding.

R. Hil. 9 Ann.

If

Declaration.

When plaintiff may apply for further time to declare.

If the plaintiff at the end of the second term wants further time to declare, he may, by applying to the secondaries, have a rule for that purpose, upon paying of 4s.; serve defendant's attorney with a copy, and shew the original; or stick a copy in the Prothonotaries office, if he does not appear; but if a rule is given by the defendant to declare, then, if the plaintiff wants further time, he may apply to one of the judges for a summons; serve copy on defendant's attorney, and attend the judge thereon, who will, if he sees reason, grant an order to the first day of the next term inclusive.

A declaration must be demanded of the agent in town.

On a rule given to declare, a declaration was demanded of the attorney in the country, by his own agreement; but the *nonpro* signed for want of a declaration, was held to be irregular; for the declaration should have been demanded in town. *Barnes* 311.

*If no rule to declare be given, plaintiff has till the effoign day of the next term.

Where the defendant, at the end of the second term, does not give a rule for the plaintiff to declare, the plaintiff has till the effoign day of the third term to deliver or file his declaration. *Pract. Reg. C. P.* 121.

Imparlanee on declaration delivered after the effoign day of the second term.

If the declaration be delivered after the effoign day of the second term, or in the second term, the defendant is intitled to an imparlanee; but if the declaration be delivered before the effoign day of the next term, after the writ is returnable, or upon the rule, to declare being given and demanded, he must plead in four days of the next term.

Declaration.

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Of declaring by the bye. In this court, no person can deliver a declaration by the bye but the plaintiff; whether the defendant enters a common appearance himself, or it is done for him by the plaintiff; and if the plaintiff declares by the bye against such defendant, he must do it the same term in which the writ is returnable. *Barnes* 346.

If an action be brought by baron only, and a declaration be delivered in that action, he cannot deliver a declaration by the bye at the suit of himself and wife. 1 *Barnes* 245. But if the writ be at the suit of himself and feme, he may deliver a declaration by the bye at the suit of himself. *Ibid.*

If action be brought by baron only, he cannot deliver a declaration by the bye, at the suit of himself and wife.

On a *capias* with an *ac-etiam*, at the suit of an executor, plaintiff cannot deliver a declaration by the bye at the suit of himself; but if the writ be a general *quare clausum frangit*, plaintiff may deliver a declaration by the bye, because now the variance is not held to be fatal, as if the writ be general, and the count as executor, or *qui tam*, or as assignee of the sheriff. *Str.* 1232. *Hainey v. Sparrow*. C. B. E. 10 Geo. 3. Where such variance was, the court held the plaintiff might proceed in his action, though he lost his bail. So in *Lloyd, qui tam v. Williams*, *M.* 11 Geo. 3. C. B. The writ was a general *capias*, and the declaration *qui tam*, and held well. 2 *Black. Rep.* 722.

When declaration cannot be delivered by the bye.

A *capias* absolute and a declaration *qui tam* well enough.

In a *præcipe quod reddat* in debt, the plaintiff can declare in no other action but debt (except he deliver a declaration by the bye),

In a *præcipe quod reddat* in debt, plaintiff can de-

clare in no other action but debt, except by the bye.

bye), and in that case he must first deliver a declaration in the original action, 3 Wils. 61.

Writ served on defendant by wrong name, after he has appeared, he may be declared against in the right name.

The defendant was served with a *capias* by the name of *Richard*, and appears by his right name, *John*, and the plaintiff declares against him by his right name; the court will not interpose in a summary way, and set aside the proceedings of the plaintiff for irregularity. 2 Wils. 393.

What declarations cannot be consolidated.

Two declarations, one against husband and wife, and the other against wife only, cannot be consolidated. 2 Wils. 227.

De bene esse, where bail is required.

You generally indorse the declaration, if delivered to the defendant's attorney, or filed, thus, after naming the cause:

This declaration is filed (or delivered, as the case is) conditionally, until special bail is put in and perfected; and the defendant is to plead hereto in four days*, otherwise judgment.

Upon service of process.

This declaration is filed (or delivered) conditionally (until an appearance is entered), and the defendant is to appear and plead hereto in eight days, otherwise judgment.

If delivered in chief.

The defendant is to plead hereto in four (or eight days, if a country cause, and above twenty miles from *London*) otherwise judgment.

N. B. It seems to be the general practice of this court, that in aailable action you

* Country cause eight days, and above twenty miles. may

Notices of Declaration.

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may file your declaration *de bene esse*, without giving notice to the defendant: but as I think this to be rather an unfair practice (and if understood well by the court, would soon be altered), I have here inserted a notice for that purpose.

* Notices of Declaration.

In the Common Pleas.

A. B. Plaintiff,
' Between and
' C. D. Defendant.

Take notice, that a declaration was this Notice of day filed with the prothonotaries, at their elaration *de* office in *Tanfield Court*, in the *Temple, London*, *de bene esse*, conditionally (until special bail is put where the action is bail- in and perfected), as of this present *Michaelmas* term, against you, at the suit of the above named plaintiff, in an action of trespass on the case, on several promises, where- in the plaintiff lays his damage to ten pounds, and unless you plead thereto in four days, from the date hereof, judgment will be signed against you by default. Dated the 6th day of *November*, 1703.

Yours, &c.

To Mr. C. D. the R. S. Attorney for
above Defendant. Plaintiff.

¹ If in the country, eight days.

In

Notice of Declaration.

In the Common Pleas.

A. B. Plaintiff;
Between and
C. D. Defendant.

The like upon common process.

Take notice, that a declaration was this day filed with the prothonotaries, at their office in *Tanfield Court*, in the *Temple, London*, conditionally (until a common appearance is entered) as of this present *Michaelmas* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case, on several promises, wherein the plaintiff lays his damage to ten pounds; and unless you appear and plead thereto, in eight days from the date hereof, judgment will be signed against you by default. Dated the 6th day of *November*, 1783.

Yours, &c.

To Mr. C. D. the R. S. Attorney for
above Defendant Plaintiff.

In the Common Pleas.

A. B. Plaintiff,
and
C. D. Defendant.

The like upon common process, where bail or appearance is filed according to the statute.

Take notice, that a declaration was this day filed with the prothonotaries, at their office in *Tanfield Court*, in the *Temple, London*, as of this present *Michaelmas* term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case, on several promises, wherein the plaintiff lays his damage to ten pounds, and unless you plead thereto in four days* from the

* In the country eight.

date

Of laying the Day, &c.

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date hereof, judgment will be signed against you, by default. Dated the 6th day of November, 1783.

Yours, &c.

To Mr. C, D. the
above defendant.

J. S. Attorney for
the Plaintiff.

This notice will do where bail is perfected, or by the bye; only say (*filed by the bye.*)

Of laying the Day in the Declaration.

IN all actions upon the case, trespass, Day, assault, battery, &c. you are not obliged to lay the certain day in your declaration, but may lay it any time after the cause of action accrued, and before the writ issued; but if the cause of action arises within the term of which the declaration is, then you do not make it as of the term generally, but make a special day after the cause of action accrued, as, "On *Saturday* next after the "morrow of *All Souls*, in *Michaelmas* term, "in the twenty-fourth year of the reign of "King *George* the Third," instead of *Michaelmas* term generally. *Str.* 806.

If the plaintiff declares on a note, the day is material, and an essential part of the agreement, from which he cannot vary; so on a bond, or other writing; but in the case of a common *assumpsit*, the day is alledged only for form, and therefore the defendant cannot confine the plaintiff to the day alledged in the declaration. *Matthews v. Spicer*, *S.r.* 806.

Where the
day is material.

Upon

Upon a parole promise, the time alledged in the declaration is only matter of form, not of substance. *Str.* 21.

In a writ of trespass for battery, or for goods carried away, if the defendant plead not guilty, *modo et forma*, and it is found that he is guilty in another term, or at another day than the plaintiff supposed, yet he shall recover; as if it be done the 4th day of *May*, and the plaintiff alledges the same to be done the 5th, or the 1st day of *May*, when no trespass was done: yet, if upon the evidence it falleth out, that the trespass was done before the action brought, it sufficeth. *Co. Lit.* 283.

If the plaintiff declares on a lease for years made to him, he ought to shew the day when the lease was made. *Plow. Com.* 24. a. So in all cases where the day or time is issuable. *Ibid.*

Declarations in Case.

*Indebitatus
assumpsit* for
work and la-
bour, and
for materials
found.

LONDON, (ff.) *A. B.* late of *London*, yeoman, was attached to answer *C. D.* in a plea of trespass on the case; and whereupon the said *C. D.* by *E. F.* his attorney, complains, *For that whereas* the said *A. B.* on the 1st day of *November*, in the year of our Lord 1782, to wit, at *London* aforesaid, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, was indebted to the said *C. D.* in 20*l.* of lawful money of *Great Britain*, for the work and labour, care and diligence of
the

the said *C. D.* by him the said *C. D.* before that time done, performed, and bestowed, in and about the business of the said *A. B.* and for the said *A. B.* and, at his request; and for divers materials, and other necessary things, found, provided, used, and applied, in and about that work, at his like request. And being so indebted, he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *C. D.* to pay him the said sum of money when he should be thereto afterwards requested. *And whereas* afterwards, to wit, *Quantum meruit* on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *C. D.* at the like request of the said *A. B.* had before that time done, performed, and bestowed, other his work and labour, care and diligence, in and about other the business of the said *A. B.* and for the said *A. B.* and had before that time, at the like request of the said *A. B.* found, provided, used and applied, divers other materials, and other necessary things, in and about that work; he the said *A. B.* then and there undertook and faithfully promised the said *C. D.* to pay him so much money as he therefore reasonably deserved to have. And the said *C. D.* avers, That he therefore reasonably deserved to have of the said *A. B.* other 20*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *A. B.* afterwards, to wit, on the

Q same

Declarations in Case.

*Indebitatus
assumpsit for
work and la-
bour gene-
rally.*

same day and year aforesaid, there had notice. *And whereas* the said *A. B.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *C. D.* in other 20*l.* of like lawful money, for the work and labour, care and diligence of the said *C. D.* by him the said *C. D.* before that time done, performed, and bestowed, in and about other the business of the said *A. B.* and for the said *A. B.* and at his request; he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *C. D.* to pay him the said last-mentioned sum of money, when he should be there-to afterwards requested. *And whereas* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *C. D.* at the like request of the said *A. B.* had, before that time done, performed, and bestowed, other his work and labour, care and diligence, in and about other the business of the said *A. B.* and for the said *A. B.* he the said *A. B.* then and there undertook, and faithfully promised the said *C. D.* to pay him so much money as he therefore reasonably deserved to have, And the said *C. D.* avers, that he therefore reasonably deserved to have of the said *A. B.* other 20*l.* of like lawful money, to wit, at *London* aforesaid, in, &c. whereof the said *A. B.* afterwards, to wit, on the same day

*Quantum me-
riti thereon.*

and year aforesaid there had notice. *And* For goods
whereas the said *A. B.* afterwards, to wit, on sold and deli-
the same day and year aforesaid, at *London* vered.
aforesaid, in, &c. was indebted to the said
C. D. in other 20*l.* of like lawful money,
for divers goods, wares, and merchandizes,
by the said *C. D.* before that time sold and
delivered to the said *A. B.* and at his spe-
cial instance and request; and, being so in-
debted, he the said *A. B.* in consideration
thereof, afterwards, to wit, on the same day
and year aforesaid, at *London* aforesaid, in
the parish and ward aforesaid, undertook
and faithfully promised the said *C. D.* to pay
him the said last-mentioned sum of money,
when he should be thereto afterwards re-
quested. *And whereas* afterwards, to wit, *Quantum me-*
on the same day and year aforesaid, at *Lon-* *ruit.*
don aforesaid, in, &c. in consideration that
the said *C. D.* at the like request of the said
A. B. had, before that time, sold and deli-
vered to the said *A. B.* divers other goods,
wares, and merchandizes; he the said *A. B.*
then and there, undertook, and faithfully
promised the said *C. D.* to pay him so much
money as he therefore reasonably deserved to
have. And the said *C. D.* avers, that he
therefore reasonably deserved to have of the
said *A. B.* other 20*l.* of like lawful money,
to wit, at *London* aforesaid, in the parish and
ward aforesaid; whereof the said *A. B.* af-
terwards, to wit, on the same day and year
aforesaid there had notice. *And whereas* the Money lent,
said *A. B.* afterwards, to wit, on the same
day and year aforesaid, at *London* aforesaid,
in the parish and ward aforesaid, was in-
debted

5
A

debted to the said C. D. in other 20*l.* of like lawful money, for money by the said C. D. before that time laid out, expended, and paid for the said A. B. and at his request, and, being so indebted, he the said A. B. in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. undertook and faithfully promised the said C. D. to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested.

Money laid
out, and

And whereas the said A. B. afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. was indebted to the said C. D. in other 20*l.* of like lawful money, for money by the said C. D. before that time laid out, expended, and paid for the said A. B. and at his special instance and request, and being so indebted, he the said A. B. in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook and faithfully promised the said C. D. to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested.

Money had
and received

And whereas the said A. B. afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said C. D. in other 20*l.* of like lawful money, for money by the said A. B. before that time had and received, to and for the use of the said C. D.; and being so indebted, he the said A. B. in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the

Declarations in Case.

the parish and ward aforesaid, undertook and faithfully promised the said *C. D.* to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested. *And whereas* the said *C. D.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *A. B.* of and concerning divers other sums of money, before that time due and owing, from the said *A. B.* to the said *C. D.* and then being in arrear and unpaid; and upon that account the said *A. B.* was then and there found in arrear to the said *C. D.* in a large sum of money, to wit, in the sum of other 20*l.* of like lawful money: and being so found in arrear to the said *C. D.* he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *C. D.* to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested. Yet the said *A. B.* not regarding his aforesaid several promises and undertakings, so by him made in this behalf, as aforesaid, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *C. D.* in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said *C. D.* (although so to do he the said *A. B.* was requested by the said *C. D.* afterwards, to wit, on the same day and year aforesaid, and often afterwards, to wit, at *London* aforesaid, in the parish and

Insimul com-
putasset.

Conclusions.

Declarations in Case.

ward aforesaid), but he to do this, hath hitherto wholly refused, and still refuses; wherefore the said *C. D.* says he is injured, and hath sustained damage to the value of 20*l.* and therefore he brings his suit, &c.

Declaration
for work and
labour with
horses, carts,
and carriages
by plaintiff
and his ser-
vants.

Middlesex, (ss.) C. D. late of *Westminster*, in the said county, yeoman, was attached to answer *A. B.* in a plea of trespass on the case; and whereupon the said *A. B.* by *E. F.* his attorney, complains, *For that whereas* the said *C. D.* on the first day of *November*, in the year of our Lord 1782, to wit, at *Westminster*, in the said county, was indebted to the said *A. B.* in 20*l.* of lawful money of *Great Britain*, for the work and labour, care and diligence of the said *A. B.* by him the said *A. B.* (and his servants), and with his horses, carts, and carriages, before that time done, performed, and bestowed, in and about the business of the said *C. D.* and for the said *C. D.* and at his special instance and request; and being so indebted, he, the said *C. D.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook and faithfully promised the said *C. D.* to pay him the said last mentioned sum of money when he should be thereto afterwards requested. *And whereas* afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *A. B.* at the like request of the said *C. D.* had, before that time (by himself and his servants), and with his horses, carts, and carriages, done, performed and bestowed, other his work and labour, care and diligence, in and about other the business

*Quantum me-
ruit.*

Declarations in Case.

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business of the said C. D. and for the said C. D. ; he the said C. D. then and there, undertook and faithfully promised the said A. B. to pay him so much money as he therefore reasonably deserved to have: And the said A. B. avers, that he therefore reasonably deserved to have, of the said C. D. other 20 l. of like lawful money, to wit, at *Westminster* aforesaid, whereof the said C. D. afterwards, to wit, on the same day and year aforesaid, there had notice. *Add two counts for work and labour generally, and for money laid out*; yet the said C. D. not regarding his aforesaid several promises and undertakings, so by him made in this behalf aforesaid, but contriving and fraudulently intending, craftily and subtilly to deceive and defraud the said A. B. in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said A. B. (although so to do, he the said C. D. was requested by the said A. B. afterwards, to wit, on the same day and year aforesaid, and often afterwards, to wit, at *Westminster* aforesaid), but he to do this hath, hitherto wholly refused and still refuses; wherefore the said A. B. says he is injured, and hath sustained damage to the value of 20 l. and therefore he brings his suit, &c.

Conclusion

Oxfordshire, (11) A. E. late of *Chipping Norton*, in the said county, widow, executrix of the last will and testament of T. E. her late husband deceased, was attached to answer A. S. widow, of a plea of trespass on the case; and whereupon the said A. S. by J. F. his attorney, complains, For that whereas the said T. F. in his life time, to wit, on the first day of *October*, in the year of our Lord 1782,

Declarations in Case.

to wit, at *Witney* in the said county, was indebted to the said *A. S.* in 20 *l.* of lawful moncy of *Great Britain*, for divers goods, wares, and merchandizes, by the said *A. S.* before that time sold and delivered to the said *T. E.* in his life time, at his special instance and request, and being so indebted, he the said *T. E.* in his life time, in consideration thereof, afterwards, to wit, on the same day and year afore said, at *Witney* afore said, in the county afore said, undertook and faithfully promised the said *A. S.* to pay her the said sum of money, when he should be thereto afterwards requested. *And whereas* afterwards, to wit, on the same day and year afore said, at *Witney* afore said, in the county afore said, in consideration that the said *A. S.* at the like special instance and request of the said *T. E.* in his life time, had, before that time, sold and delivered to the said *T. E.* in his life time, divers other goods, wares and merchandizes, he, the said *T. E.* in his life time, then and there undertook and faithfully promised the said *A. S.* to pay her so much money as she therefore reasonably deserved to have. And the said *A. S.* avers, that she therefore reasonably deserved to have of the said *T. E.* in his life time, other 20 *l.* of like lawful money, to wit, at *Witney* afore said, in the county afore said, whereof the said *T. E.* in his life time, afterwards, to wit, on the same day and year afore said, there had notice. *And whereas* the said *T. E.* in his life time, afterwards, to wit, on the same day and year afore said, at *Witney* afore said, in the county afore said, was indebted to the said *A. S.* in other 20 *l.* of like lawful money, to money by

Money laid
out.

by the said *A. S.* before that time laid out, expended, and paid for the said *T. E.* in his life time, and at his special instance and request; and, being so indebted, he the said *T. E.* in his life time, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, undertook and faithfully promised the said *A. S.* to pay her the said last-mentioned sum of money, when he should be thereto afterwards requested. Yet the said *T. E.* in his life time, and the said *A. E.* executrix as aforesaid, since his death, not regarding the said several promises and undertakings, so by the said *T. E.* in his lifetime, made in this behalf as aforesaid; but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said *A. S.* in this respect, have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *A. S.* (although so to do, he the said *T. E.* in his life time, was requested by the said *A. S.* and the said *A. E.* executrix as aforesaid, since the death of the said *T. E.* afterwards, to wit, on the first day of *December*, in the year of our Lord 1782, and often afterwards, to wit, at *Witney* aforesaid, in the county aforesaid; but the said *T. E.* in his life time, and the said *A. E.* executrix as aforesaid, since his death, have, and each of them hath hitherto wholly refused, and the said *A. E.* executrix as aforesaid, still refuses; wherefore the said *A. S.* saith she is injured, and hath sustained damage to the value of 30*l.* and therefore she brings her suit, &c.

Common
conclusion.

Middlesex

Declarations in Case.

For an executor for goods sold and delivered.

Middlesex, (ss.) J. D. late of Westminster, in the county of Middlesex, hosier, was attached to answer D. M. executor of the last will and testament of J. M. deceased, in a plea of trespass on the case; and whereupon the said D. M. by E. F. his attorney, complains, For that whereas the said J. D. on the first day of November, in the year of our Lord 1782, to wit, at Westminster, in the said county, was indebted to the said J. M. in his lifetime, in 100 l. of lawful money of Great Britain, for divers goods, wares, and merchandizes, by the said J. M. in his lifetime, before that time, sold and delivered to the said J. D. and at his special instance and request; and being so indebted, he the said J. D. in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, undertook and faithfully promised the said J. M. in his life time, to pay him the said sum of money, when he should be thereto afterwards requested,

Quantum meruit.

And whereas afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, in consideration that the said J. M. in his life time, at the like request of the said J. D. had, before that time, sold and delivered to the said J. D. divers other goods, wares, and merchandizes, he, the said J. D. undertook and faithfully promised the said J. M. in his life time, to pay him so much money as he therefore reasonably deserved to have; and the said D. M. executor as aforesaid, avers, that the said J. M. in his life time, therefore reasonably deserved to have of the said J. D. other 100 l. of like lawful money,

to wit, at *Westminster* aforeaid, in the county aforeaid, whereof the said *J. D.* afterwards, to wit, on the same day and year aforeaid, there had notice. *Add a count for money laid out. Yet* the said *J. D.* not regarding his aforeaid several promises and undertakings to by him made in this behalf as aforeaid, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said *J. M.* in his life time, and the said *D. M.* executor as aforeaid, since his death, in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said *J. M.* in his life time, or to the said *D. M.* executor as aforeaid, since his death, or to either of them (although so to do, he the said *J. D.* was requested, by the said *J. M.* in his lifetime) oftentimes, and by the said *D. M.* executor as aforeaid, since his death, afterwards, to wit, on the *seventh* day of *September*, in the year aforeaid, to wit, at *Westminster* aforeaid, but he to do this hath hitherto wholly refused, and still refuses, wherefore the said *D. M.* executor as aforeaid, saith he is injured, and hath sustained damage to the value of 200*l.* and therefore he brings his suit, &c. And he brings into court here the letters testamentary on the said *J. M.* whereby it fully appears, that the said *D. M.* is executor of the last will and testament of the said *J. M.* and hath the administration thereof, &c.

Conclusion.

Profect of the letters testamentary.

Indors (ff.) J. D. late of, &c. was attached to answer *J. D.* administrator of all and singular the goods, chattels, and credits which were of *A. P.* deceased, in a plea of trespass on the

For an administrator.

the

Complains
 1. 4

the case: and whereupon the said *J. D.* by *L. I.* his attorney complains, *For that whereas, (some as in the declaration for an executor, only calling him administrator), Yet the said J. not regarding, &c. but contriving, &c. in this respect hath not yet paid the said several sums of money, or any part thereof to the said A. P. in his life time, or to the said J. D. administrator as aforesaid since his death, or to either of them (to which said John, administration of all and singular the goods, chattels, and credits which were of the said A. P. at the time of his death, were, by Thomas, by divine providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, on the first day of November, in the year of our Lord 1782, to wit, at Lonaon aforesaid, in the parish and ward aforesaid, in due form of law granted), (although to do this the said J. Y. was requested by the said A. in his lifetime, oftentimes, and by the said J. D. administrator as aforesaid, since his death, to wit, on the said first day of November, in the year aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid), but he to do this hath hitherto wholly refused, and still refuses, wherefore the said J. D. administrator as aforesaid, says he is injured, and hath sustained damage to the value of 100*l.* and therefore he brings suit, &c.*

Pro se tunc in
 cu id.

And he brings into court here the letters of administration of the said *A.* which sufficiently prove the granting thereof in form aforesaid, the date whereof is the day and year in that behalf above-mentioned.

Middlesex,

Middlesex, (ff.) C. O. late of *Wapping*, in the county of *Middlesex*, merchant, was attached to answer to R. G. and R. T. assignees of the estate, debts, and effects which were of *H. B.* a bankrupt, according to the form of the statutes made and now in force concerning bankrupts, in a plea of trespass on the case; and whereupon the said R. G. and R. T. assignees as aforesaid, by *H. A.* their attorney, complain, *That whereas* the said C. O. on the 1st day of *March*, in the year of our Lord 1781, to wit, at *Westminster*, in the county of *Middlesex* aforesaid, was indebted to the said *H. B.* before he became bankrupt, in the sum of 160*l.* of lawful money of *Great Britain*, for premiums of insurance before that time due, and payable from him the said C. to the said *H. B.* before he became a bankrupt, for and upon divers large sums of money before that time subscribed by the said *H. B.* upon divers policies of assurance to him the said C. and at his special instance and request; and being so indebted, he the said C. in consideration thereof afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, undertook, and to the said *H. B.* before he became bankrupt, and then and there faithfully promised to pay him, the said *H. B.* the said sum of money, when he the said C. should be thereunto afterwards requested. *And whereas* also the said C. afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, was indebted to the said *H. B.* before he became a bankrupt, in the

Declaration by the assignees of a bankrupt for premium of insurance, and work done by the bankrupt.

further

further sum of 160*l.* of like lawful money, for the work and labour, care and diligence of the said *H. B.* before that time done, performed, and bestowed in and about the business of the said *C.* and for the said *C.* at his like special instance and request; and being so indebted, he the said *C.* in consideration thereof afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, undertook, and to the said *H. B.* before he became bankrupt, then and there faithfully promised to pay him the said sum of money last mentioned, when he the said *C.* should be thereunto afterwards requested. *And whereas* also afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, in consideration that the said *H. B.* before he became bankrupt, had, before that time, done, performed, and bestowed other his work and labour, care and diligence, in and about other the business of the said *C.* and for the said *C.*; and at his like special instance and request, he the said *C.* undertook, and to the said *H. B.* before he became bankrupt, then and there faithfully promised to pay to him so much money as he therefore reasonably deserved to have for the same, when he the said *C.* should be thereunto afterwards requested; and the said *R. G.* and *R. T.* assignees as aforesaid, aver that the said *H. B.* before he became bankrupt, therefore reasonably deserved to have of the said *C.* another sum of 160*l.* of like lawful money, to wit, at *Westminster* aforesaid, in the county aforesaid, whereof the said

C.

C. afterwards, to wit, on the same day and year aforesaid, there had notice (add a count for money paid; and money had and received): yet the said C. not regarding his said several promises and undertakings so by him made in manner aforesaid, but contriving and fraudulently intending, craftily and subtilly to deceive and defraud the said H. before he became a bankrupt; and the said R. G. and R. T. assignees as aforesaid, since the bankruptcy of the said H. in this respect, hath not paid the said several sums of money, or any part thereof to the said H. before he became a bankrupt, or to the said R. G. and R. T. assignees as aforesaid, since he became a bankrupt, or to either of them (although so to do, he the said C. was oftentimes requested by the said H. before he became a bankrupt, and by the said R. G. and R. T. assignees as aforesaid, since he became bankrupt, to wit, on the 1st day of *January*, in the year of our Lord 1783, and often afterwards, to wit, at *Wesminster* aforesaid, in the county aforesaid), but he to pay the same to them, or either of them, hath hitherto wholly refused, and to pay the same to the said R. G. and R. T. assignees as aforesaid, still doth refuse; wherefore the said R. G. and R. T. assignees as aforesaid, say they are injured, and have sustained damage to the value of 160*l.* and therefore they bring their suit, &c.

Middlesex, to wit, *James Roe*, late of *Westminster*, in the said county, yeoman, was attached to answer *John Doe* in a plea of trespass on the case, and whereupon the said *John*, by *J. L.* his attorney, complains,
That

Conclusion.

Declaration on Note.
Drawer v. drawer.

Declarations in Case.

That whereas the said *James*, on the 1st day of *May*, in the year of our Lord 1783, to wit, at *Westminster*, in the county aforesaid, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said *John*, and thereby, six weeks after the date thereof, promised to pay to the said *John*, by the name of Mr. *Doe* or order 20*l.* for value received; by reason whereof, and by force of the statute in such case made and provided, the said *James* became liable to pay to the said *John* the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and being so liable, he the said *James*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note. *And whereas* the said *James*, afterwards, to wit, on the 15th day of *June*, in the year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in 30*l.* of lawful money, &c. add a count for money lent, money had and received, and the common conclusion.

Indorsee
against the
indorser, on a
note, the
drawer refusing
payment.

London, (ss.) *S. E.* late of *London*, merchant, was attached to answer *F. R.* in a plea of trespass on the case; and whereupon the said *F. R.* by *R. L.* his attorney, complains, *For that whereas* one *E. H.* on the 3d day of *May*, in the year of our Lord 1783, to wit,

at

at *London* aforesaid, in the parish of *Saint Mary le Bow*, in the ward of *Cheap*, made her certain note in writing, commonly called a promissory note, her own proper hand being thereto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said *S.* by which note she the said *E. H.* promised to pay to the said *S.* by the name of Mr. *S. E.* or order, four months after the date thereof, the sum of 95*l.* for value received: and the said *S.* to whom, or to whose order the payment of the said sum of money in the said note specified, was, by the said note, after the making thereof, and before the payment of the said sum of money in the said note specified, or of any part thereof, and also before the time appointed by the said note for payment thereof, to wit, on the same day and year aforesaid, at *London* aforesaid, &c. indorsed the said note, his own proper hand being thereon subscribed, by which said indorsement he the said *S. E.* appointed the said sum of money in the said note specified to be paid to the said *F.* and then and there delivered the said note so indorsed to the said *F.* of which said indorsement so made on the said note as aforesaid, she the said *E. H.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, had notice, by means whereof, and by force of the statute in such case made and provided, he the said *S.* became liable to pay to the said *F.* the said sum of money in the said note specified, according to the tenor and effect of

Averment.

the said note, and of the said indorsement so made thereon as aforesaid, when he should be thereto afterwards requested, and being so liable, he the said *S.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, &c. undertook, and faithfully promised the said *F.* to pay him the said sum of money in the said note specified, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid, when he should be thereto afterwards requested. And the said *F.* avers, That he the said *F.* did, after the end and expiration of the said space of four months in the said note mentioned, and by the said note appointed for payment thereof, to wit, on the 11th day of *September*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, shew and present, and cause to be shewn and presented the said note to the said *E.* for payment thereof, and then and there requested her to pay him the said sum of money in the said note specified, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid, but that the said *E.* did not, at the said time when the said note was so shewn and presented to her for payment thereof as aforesaid, or at any other time whatsoever, hitherto pay or cause to be paid unto him the said *F.* the said sum of money in the said note specified, or any part thereof, but then and there wholly refused, and neglected, and still doth refuse and neglect so to do, whereof the said *S.* afterwards, to wit,

wit, on the same day and year aforesaid, at *London* aforesaid, &c. had notice: And whereas the said S. afterwards, to wit, on the same day and year last aforesaid, at *London* aforesaid, in, &c. was indebted. *Add account for money had and received, and common conclusion.*

London, (ff.) T. C late of *London*, merchant, was attached to answer *J. P.* and *E. B.* in a plea of trespass on the case; and whereupon the said *J. P.* and *E. B.* by *A. D.* their attorney, complain, *That whereas*, at the several times hereafter mentioned, the said *T. C.* *J. P.* and *E. B.* and one *T. G.* were persons residing, trading, and using commerce within this kingdom of *England*, to wit, at *London* aforesaid, in the parish of *Saint Mary le Bow*, in the ward of *Cheap*. *And whereas* the said *J. P.* and *E. B.* at those several times, were partners and joint dealers together in their trade and commerce, to wit, at *London* aforesaid, in the parish and ward aforesaid: *And whereas* the said *J. C.* *J. P.* *E. B.* and *T. G.* being so resident, trading, and using commerce as aforesaid, and the said *J. P.* and *E. B.* so being partners and joint dealers together as aforesaid, the said *T. G.* on the 29th day of *September*, in the year of our Lord 1783, to wit, at *London* aforesaid, in the parish and ward aforesaid, according to the custom of merchants, from time immemorial there used and approved of within this kingdom, made his certain bill of exchange in writing, his own proper hand being thereto subscribed, bearing date the day and year aforesaid, and then

Drawees
partners
against the
acceptor on a
bill of ex-
change.

and there directed the said bill to the said T. C. by the name of Mr. T. C. merchant, in *Milk-street, London*, and thereby required the said T. C. to pay, three months after the date of the said bill, to the said J. P. and and E. B. by the names of Messrs. J. P. and E. B. or order 80*l.* pounds for value received; which said bill of exchange he the said T. C. afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, upon sight thereof accepted, according to the custom aforesaid, and by reason thereof, and according to the said custom, and by the law of merchants, the said T. C. became liable to pay to the said J. P. and E. B. the said sum of 80*l.* in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his acceptance thereof, and being so liable, he the said T. C. in consideration thereof afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook and faithfully promised the said J. P. and E. B. to pay them the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his acceptance thereof. *And whereas* the said J. C. afterwards, to wit, on *Et. at Et. and count for money had and received, on the count in conclusion.*

Indorsees
partners
against the
acceptor on a
bill drawn by
partners pay-

London, (a.) J. C. late of, was attached to answer to T. W. and W. of a plea of trespass on the case; and whereupon the said T. W. and W. K. by S. U. their attorneys, complain, *For that whereas* certain persons

sons carrying on trade and commerce under the name, style, and firm of *S. P. and Co.* on the 3d day of *October*, in the year of our Lord 1782, to wit, at *London* aforesaid, in, &c. according to the usage and custom of merchants, from time immemorial used and approved of, made their certain bill of exchange, the hand-writing of one of them for himself, and the other of them being thereunto subscribed, and the said bill, bearing date the same day and year aforesaid, then and there directed to the said *J. R.* by the name and addition, style, firm, and description of *Mr. J. R. and Co. merchant, Liverpool*, and thereby required the said *J. R.* two months after date, to pay to their own order 106*l.* 5*s.* value received, and to place the same to account of the said *S. P. and Co.* which said bill of exchange he the said *J. R.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. upon sight thereof accepted, according to the said custom, payable in *London*, not exceeding one month; and the said *T. and Co.* to whose order the payment of the said sum of money mentioned in the said bill was to be made afterwards, and before the payment of the said sum of money mentioned in the said bill, or of any part thereof, and also before the time appointed by the said bill for payment thereof, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. indorsed the said bill, the hand-writing of one of them for himself, and the other of them being thereunto subscribed, according to the said custom, and by that indorsement

appointed the contents of the said bill to be paid to the said *T. W.* and *W. K.* and then and there delivered the said bill so indorsed to the said *T. W.* and *W. K.* of which said indorsement so made on the said bill as aforesaid, he the said *J. R.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. had notice; by means whereof, according to the said custom, and by the law of merchants, the said *J. R.* became liable to pay to the said *T. W.* and *W. K.* the said sum of money mentioned in the said bill, according to the tenor and effect of the said bill, and of the said indorsement so made thereon as aforesaid, and of his said acceptance thereof, and being so liable, he the said *J. R.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. undertook, and then and there faithfully promised the said *T. W.* and *W. K.* to pay them the said sum of money mentioned in the said bill, according to the tenor and effect of the said bill, and of the said indorsement so made thereon as aforesaid, and of his said acceptance thereof. *Add a court for money had and received, lent and advanced, common conclusion.*

Declaration
for an attorney's bill.

Middlesex, (ff.) *I. H.* was attached by his Majesty's Writ of Privilege, issuing out of the court here, to answer *E. A.* Gentleman, one of the attornies of the court of the Bench here: according to the liberties and privileges of the same court, for such attornies and other ministers of the same bench, from time out of mind used and approved of in the same court, of a plea of trespass on the case,
 &c.

Ec. and thereupon the said *E. A.* in his proper person, complains, *That whereas* the said *L. H.* on the 19th day of *May*, in the year of our Lord 1782, at *Westminster*, in the county of *Middlesex*, was indebted to the said *E. A.* in the sum of 300*l.* of lawful money of *Great Britain* for work and labour as an attorney and solicitor, before then done and performed by the said *E. A.* upon the retainer, and at the special instance and request of the said *L. H.* in and about the prosecuting, defending, and soliciting divers causes, suits, and businesses for the said *L. H.* and for money paid, laid out, and expended, by the said *E. A.* at the like instance and request of the said *L. H.* in and about the prosecuting, defending, and soliciting of those causes, suits, and businesses, and for money due to the said *E. A.* for his fees due, and of right payable to him in that respect; and being so indebted, the said *L. H.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, took upon himself, and then and there faithfully promised the said *E. A.* that he the said *L. H.* would well and truly pay to the said *E. A.* the said sum of 300*l.* when he, the said *L. H.* should be thereunto afterwards requested. *And whereas also,* (Quantum merdit, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, in consideration that the said *E. A.* upon the retainer, and at the like instance and request of the said *L. H.* had before that time, done and performed other work and labour as an attorney and solicitor

Declarations in Case.

in and about the prosecuting, defending, and soliciting divers other causes and suits at law, for the said *L. H.* he the said *L. H.* took upon himself, and then and there faithfully promised the said *E. A.* that he the said *L. H.* would well and truly pay the said *E. A.* so much money as he the said *E. A.* reasonably deserved to have for his said last mentioned work and labour, and so much money as was due to the said *E. A.* for his fees due, and of right payable to him in that respect, when he the said *L. H.* should be thereunto afterwards requested. And the said *E. A.* in fact saith, that he reasonably deserved to have of the said *L. H.* for his last mentioned work and labour, and for his fees due, and of right payable to him in that respect, other 300*l.* of like lawful money, to wit, at *Westminster* aforesaid, in the county aforesaid: whereof the said *L. H.* of the said *E. A.* then and there had notice. *And whereas also*, the said *L. H.* afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, was indebted to the said *E. A.* in other 300*l.* of like lawful money, for other work and labour, care and diligence of the said *E. A.* by the said *E. A.* before that time done, performed, and bestowed in and about the drawing, making, and ingrossing of divers deeds and writings for the said *L. H.* at his like instance and request; and being so indebted, he the said *L. H.* in consideration thereof, afterwards, to wit, on the same day and year above said, at *Westminster* aforesaid, in the county aforesaid, undertook, and to the said

E. A.

E. A. then and there faithfully promised, to pay him the said 300*l.* last mentioned, when he the said *L. H.* should be thereunto afterwards requested. *And whereas also*, afterwards, to wit, on the same day and year abovesaid, at *Westminster* abovesaid, in the county abovesaid, in consideration that the said *E. A.* had, before that time, at the like instance and request of the said *L. H.* done, performed, and bestowed other work and labour, care and diligence, in and about the drawing, making, and ingrossing of divers other deeds and writings, for the said *L. H.* he the said *L. H.* undertook, and to the said *E. A.* then and there faithfully promised to pay him so much money as he therefore reasonably deserved to have, when he the said *L. H.* should be thereunto afterwards requested: and the said *E. A.* avers, that he therefore reasonably deserved to have of the said *L. H.* other 300*l.* of like lawful money, to wit, at *Westminster* abovesaid, in the county abovesaid, whereof the said *L. H.* of the said *E. A.* then and there had notice.

Add a count for money lent and advanced, for money laid out and expended, for money had and received, and on an account stated. Nevertheless,

Conclusion.

the said *L. H.* not regarding his said several promises and undertakings, by him made in this behalf as aforesaid, but contriving, and fraudulently intending, craftily and subtilly to deceive and defraud the said *E. A.* in this respect, hath not yet paid the said several sums of money, or any part thereof to the said *E. A.* (although so to do, the said *L. H.* afterwards, to wit, on the 20th day of *May*,

in

Declarations in Debt.

in the said year of our Lord, 1782, and often afterwards, at *Westminster* aforesaid, in the county aforesaid, by the said *E. A.* was requested), but to pay the said several sums of money, or any part, to the said *E. A.* hath wholly refused, and the said *L. H.* still doth refuse to pay the same to the said *E. A.* To the damage of the said *E. A.* of 300*l.* and therefore he brings his suit, &c. Add pledges to prosecute.

Declarations in Debt.

On bond,
obligee against
obligor.

LONDON, (ss.) *C. D.* late of *London*, grocer, was summoned to answer *A. B.* of a plea, that he render to him, the said *A. B.* 800*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; and whereupon the said *A. B.* by *E. F.* his attorney, complains, *For that whereas* the said *C. D.* on the 20th day of *April*, in the year of our Lord 1783, to wit, at *London* aforesaid, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, by his certain writing obligatory, sealed with the seal of the said *C. D.* became held and firmly bound unto the said *A. B.* in the sum of 800*l.* to be paid to the said *A. B.* when he should be thereto afterwards requested. Yet the said *C. D.* (altho' often requested, &c.) hath not yet paid the said 800*l.* or any part thereof, to the said *A. B.* but he to pay the same hath hitherto wholly refused, and still doth refuse; wherefore the said *A. B.* saith, he is injured, and hath sustained damage to
the

the value of 10 *l.* and therefore he brings his
suit, &c.

And he brings into court here the said writ- *Profert incur,*
ing obligatory, sealed with the seal of the said
C. D. which gives sufficient evidence of the
debt aforesaid, in form aforesaid, the date
whereof is the day and year aforesaid, &c.

London, (H.) G. F. late of *London*, gro- Declaration
cer, was summoned to answer *J. W.* and *S.* in debt, upon
his wife, of a plea, that he render to the said a bond given
J. W. and *S.* the sum of 100 *l.* of lawful mo- to the wife
ney of *Great Britain*, which he owes to, and whilst a feme-
unjustly detains from them; and whereupon file.
the said *J. W.* and *S.* by *A. B.* their attor-
ney, complain, *For that whereas* the said
G. F. on the 21st day of *November*, in the
year of our Lord 1771, to wit, at *London*
aforesaid, in the parish of *St. Mary le Bow*,
in the ward of *Cheap*, by his certain writing
obligatory, sealed with his seal, became held
and firmly bound to the said *S.* by the name
of *S. H.* spinster, whilst she was *sole*, and
before her intermarriage with the said *J. W.*
in the sum of 100 *l.* of good and lawful mo-
ney of *Great Britain*, to be paid to the said
S. when he the said *G. F.* should be thereunto
afterwards requested; yet the said *G. F.* (al-
though often requested) hath not yet paid the
said sum of 100 *l.* or any part thereof, to the
said *S.* whilst she was *sole*, and before her
intermarriage with the said *J. W.* or to
the said *J. W.* and *S.* since the marriage ce-
lebrated between them, or to either of them,
but he to pay the same hath hitherto wholly
refused, and to pay the same to the said
J. W. and *S.* still doth refuse; wherefore the
said

Declarations in Debt.

said *J. W.* and *S.* his wife, say, they are injured, and have sustained damage to the value of 10*l.*; and therefore they bring their suit, &c.

Proferit incur. And they bring here into court the said writing obligatory, sealed with the seal of the said *G. F.* which gives sufficient evidence of the debt aforesaid, in form aforesaid, the date whereof is the day and year aforesaid.

Declaration
on bond at
the suit of
assignees of a
bankrupt.

Middlesex, to wit, *S. F.* late of, &c. was summoned to answer *R. T.* and *J. A.* assignees of the estate, debts, goods, and effects, of *J. M.* a bankrupt, according to the form of the statutes made and now in force concerning bankrupts, of a plea, that he render to them the sum of 1420*l.* of good and lawful money of *Great Britain*, which he owes to, and unjustly detains from them; and whereupon the said *R. T.* and *J. A.* by *J. B.* their attorney, complain, *That whereas* the said *S. F.* before the said *J. M.* became a bankrupt, to wit, on the 8th day of *January*, in the year of our Lord 1781, at *Westminster*, in the said county, by his certain writing obligatory, sealed with his seal, and then and there by him duly made and delivered, and bearing date the same day and year aforesaid, acknowledged himself to be held and firmly bound to the said *J. M.* in the sum of 1420*l.* of good and lawful money of *Great Britain*, to be paid to the said *J. M.* or his certain attorney, executors, administrators, or assigns, when he the said *S. F.* should be thereunto afterwards requested; Yet the said *S. F.* (although by the said *J. M.* before he be-

Conclusion

came

came a bankrupt, and by the said *R. T.* and *J. A.* assignees as aforesaid, since he became a bankrupt, often requested, &c.) did not pay to the said *J. M.* before he became a bankrupt, nor to the said *R. T.* and *J. A.* assignees as aforesaid, since the said *J. M.* became a bankrupt, or to either of them, the said 1420*l.* or any part thereof; but he to pay the same, or any part thereof, hath hitherto wholly refused, and still doth refuse; wherefore the said *R. T.* and *J. A.* assignees as aforesaid, say, they are injured, and have sustained damage to the value of 10*l.* and therefore they bring their suit, &c. And the said *R. T.* and *J. A.* assignees as aforesaid, now bring here into court the said writing obligatory, sealed with the seal of the said *S. F.* which gives sufficient evidence of the debt aforesaid, in form aforesaid, the date whereof is the same day and year in that behalf above mentioned, &c.

London, (H.) J. T. late of, &c. was attached to answer *C. P.* and *R. S.* executors of the last will and testament of *P. P.* Esq; deceased, of a plea, that he render to them 2400*l.* of lawful money of Great Britain, which he unjustly detains from them; and whereupon the said *C. P.* and *R. S.* by *S. U.* their attorney, complain, *For that whereas* the said *J. T.* on the 25th day of March, in the year of our Lord 1777, at *London* aforesaid, to wit, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, by his certain writing obligatory, sealed with the seal of the said *J. T.* acknowledged himself to be held and firmly bound unto the said *P. P.* deceased, in his life time, in the aforesaid sum of 2400*l.*

2400 *l.* of lawful money of *Great Britain*; to be paid to the said *P. P.* deceased, his executors, administrators, or assigns, when he the said *J. T.* should be thereto afterwards requested; nevertheless the said *J. T.* (although often requested by the said *P. P.* deceased, in his lifetime, and by the said *C. P.* and *R. S.* since the decease of the said *P. P.* hath not rendered or paid the said sum of 2400 *l.* or any part thereof, to the said *P. P.* deceased, in his lifetime, neither hath he rendered the same, or any part thereof, to the said *C. P.* and *R. S.* since the decease of the said *P. P.*) but to render or pay the same to the said *P. P.* deceased, in his lifetime, and also to them the said *C. P.* and *R. S.* since the decease of the said *P. P.* he the said *J. T.* hath hitherto wholly refused, and still doth refuse; wherefore the said *C. P.* and *R. S.* executors as aforesaid, say, they are injured, and have sustained damage to the value of 30 *l.* and therefore they bring Tuit, &c.

Profert in cur. And the said *C. P.* and *R. S.* bring here into court the letters testamentary of the said *P. P.* deceased, by which it sufficiently appears to the court here, that they are the executors of the said *P. P.* and have the administration thereof, &c.

Declaration
in debt, upon
judgment, re-
covered in the
C. P. for the
defendant.

Middlesex, (ss.) *J. H.* late of *Oxford*, in the county of *Oxford*, yeoman, was summoned to answer *T. B.* in a plea, that he render to the said *T. B.* 22 *l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; and whereupon the said *T. B.* by *S. U.* his attorney, complains, *For that whereas* the said *T. B.*

here-

heretofore, to wit, in *Michaelmas* term, in the 23d year of the reign of his present Majesty, in the court of our Lord the King of the Bench, before *Alexander Lord Loungeborough*, and his companions, then justices of our said Lord the King of the Bench aforesaid, to wit, at *Westminster*, in the county of *Middlesex*, by the consideration of the said court, recovered against the said *J. H.* 22*l.* which were adjudged to the said *T. B.* in and by the said court of the Bench, according to the form of the statute in that case made and provided, for his costs and charges, which he had sustained in and about his defence in a certain plea of trespass on the case, on promises, against the said *T. B.* at the suit of the said *J. H.* whereof the said *J. H.* is convicted, as by the record and proceedings thereof, remaining in the said court of the Bench aforesaid, here, to wit, at *Westminster* aforesaid, more fully appears; which said judgment still remains in full force, vigour, and effect, not in the least reversed, annulled, paid off, or any ways satisfied; and the said *T. B.* hath not yet obtained any execution of the said judgment, whereby an action hath accrued to the said *T. B.* to demand and have of the said *J. H.* the said 22*l.* above demanded; Yet the said *J. H.* (although often requested, &c.) hath not yet rendered to the said *T. B.* the said 22*l.* or any part thereof, but he the said *J. H.* to render the same, or any part thereof, to the said *T. B.* hath hitherto wholly refused, and still refuses so to do; wherefore
the

the said *T. B.* saith, that he is injured, and hath damage to the value of 10*l.* and therefore he brings his suit, &c.

Declaration
upon a judgment recovered
in an inferior court.

Oxfordshire, (H.) J. C. late of *Oxford*, in the said county, Innkeeper, was summoned to answer *H. C.* in a plea, that he render to him the said *H.* 5*l.* 17*s.* 2*d.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him; and whereupon the said *H.* by *S. U.* his attorney, complains, *For that whereas*, the said *H.* at the county court of *R. L.* Esq. sheriff of the said county of *Oxford*, holden for the said county at *Oxford*, in the said county, and within the jurisdiction of the said court, on the 24th day of *October*, in the year of our Lord 1780, came in his proper person, and then and there, in the said court, according to the custom of the said court, levied his plaint against the said *W.* in a plea of trespass on the case, to the said *H.* his damage of 1*l.* 19*s.* for a certain cause of action arising to him against the said *W.* within the jurisdiction of the said court, and then and there found pledges to prosecute his said plaint, to wit, *John Doe* and *Richard Roe*; and such proceedings were thereupon had in the said court, in the plea aforesaid, that afterwards, to wit, at the county court of *R. P. J.* Esq. sheriff of the said county, holden at *Oxford* aforesaid, in the county aforesaid, and within the jurisdiction of the said court, to wit, on *Wednesday* the 24th day of *October*, in the year of our Lord 1781, aforesaid, before certain free suitors of the said court, the said *H.* by the consideration and judgment of the said court, recovered against the said *W.* in the plea aforesaid,

aforesaid, 5*l.* 17*s.* 2*d.* which, in and by the said court were then and there adjudged to the said *H.* and with his assent, for his damages, which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said *W.* to the said *H.* at *Witney*, in the said county of *Oxford*, and within the jurisdiction of the said court, as for his costs and charges, by him laid out about his suit in that behalf, whereof the said *W.* was convicted, as by the memorandums and proceedings thereon, remaining in the said county court, more fully appears, which said judgment still remains in its full force in that court, unreversed, unpaid, and not satisfied; and the said *H.* hath not yet obtained any execution of the aforesaid judgment, whereby an action hath accrued to the said *H.* to demand and have of the said *W.* the said 5*l.* 17*s.* 2*d.* above demanded: Yet the said *W.* (although often requested, &c.) hath not yet paid the said 5*l.* 17*s.* 2*d.* above demanded, or any part thereof, to the said *H.* but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses; wherefore the said *H.* saith he is injured, and hath sustained damage to the value of 10*l.* and therefore he brings his suit, &c.

London, (ff.) John Denn, late of *London*, Declaration grocer, was summoned to answer *Richard* in debt on a *Denn*, assignee of Sir *Robert Taylor*, Knt. and bail-bond. *Benjamin Cole*, Esq. sheriffs of the said city Sheriff of the of *London*, according to the form of the county of statute in such case made and provided, of a *Middlesex*. plea that he render to the said *Richard*, assignee

Declarations in Debt.

N. B. This form will do for a bond taken in Middlesex, or any other county, as altered in the margin.

Sheriff
was
his

Sheriff

Sheriff

signee as aforesaid, 600 l. of lawful money of Great Britain, which he owes to, and unjustly detains from him; and whereupon the said Richard, by J. B. his attorney, complains, That whereas, the said Richard heretofore, to wit, on the 5th day of June, in the year of our Lord 1783, sued forth out of the said court of our said Lord the King of the Bench here (the said court being then and now at Westminster, in the said county of Middlesex), a certain writ of our Lord the King called a *capias ad respondendum*, directed to the said sheriffs, by which said writ, the said sheriffs were commanded to take the said John Denn, if he should be found in their bailiwick, and him safely keep, so that he might have his body before his Majesty's justices at Westminster on the morrow of the Holy Trinity, then next coming, to answer the said Richard in a plea of trespass; and also that the said John might answer the said Richard according to the custom of the court of our Lord the King of Common-Bench here, in a certain plea of debt upon demand for 600 l.; and that the said sheriffs should then have there that writ, which said writ afterwards and before the delivery thereof to the said sheriffs for execution, as hereafter is mentioned, was duly marked or indorsed for bail for 300 l. by virtue of an affidavit made and filed in the said court, of the cause of action of the said Richard, in that behalf, according to the form of the statute in such case made and provided; which said writ so indorsed afterwards and before the return thereof, to wit, on the 14th day of June, in the year aforesaid,

Declarations in Debt.

said, at *London* aforesaid, in the parish and ward aforesaid, was delivered to the said Sir *Robert Taylor* and *Benjamin Cole*, then and still being *sheriffs of the said city*, to be executed in due form of law; by virtue of *said county*. which said writ, the said Sir *Robert Taylor* and *Benjamin Cole*, *sheriffs*, as aforesaid, afterwards and before the return of the said writ, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within *their* bailiwick, took and arrested the said *John* by his body, and then and there had and detained him in *their* custody, at the suit of the said *Richard*, for the cause aforesaid; and the said *John* being so arrested and in custody of the said Sir *Robert Taylor* and *Benjamin Cole*, *sheriffs*, as aforesaid, afterwards and before the return of the said writ, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took bail for the appearance of the said *John*, at the return of the said writ, and on that occasion the said *John*, on the said 14th day of *June*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, by his certain writing obligatory, commonly called a bail-bond, sealed with his seal, and now shewn to the court here, the date whereof is the day and year last aforesaid, acknowledged himself to be held and firmly bound to the said Sir *Robert Taylor* and *Benjamin Cole*, *sheriffs of the said city of London*, by the names of Sir *Robert Taylor*, Knight, and *Benjamin Cole*, Esquire, *sheriffs of the city of London*, in the sum of 600*l.* of good and lawful

sheriff

his

his

sheriff

Sheriff of the
county of
Middlesex.

Sheriff of, &c.

Sheriff
his

money of Great Britain, to be paid to the said *Sheriffs*, or their certain attorney, executors, administrators, or assigns, when he the said *John* should be thereunto required, with a condition to the said writing obligatory, underwritten, that if the said *John* should appear before the justices of our said Lord the King at *Westminster*, on the morrow of the *Holy Trinity*, to answer to the said *Richard*, in a plea of trespass; and also that the said *John* might answer the said *Richard*, according to the custom of his Majesty's court of Common-Bench here, in a certain plea of debt upon demand for 600*l.*; that then the said obligation should be void and of no force, otherwise should stand and remain in full force, vigour, and effect, as by the said writing obligatory, and the said condition thereof (relation being thereto had), will more fully appear; which said writing obligatory, with the condition thereunder written, was taken by the said *Sheriffs*, by virtue of the said writ, and by force of the statute in such case lately made and provided; and the said *Richard* in fact saith, that the said *John* did not appear before his Majesty's justices at *Westminster*, on the morrow of the *Holy Trinity*, in the condition aforesaid mentioned, according to the exigency of the said writ, whereby the said writing obligatory became forfeited, and the said sum of money therein mentioned, or any part thereof, not being paid to the said *Sheriffs*, the said Sir *Robert Taylor* and *Benjamin Cole*, then and now being *Sheriffs* of the said city of *London*, afterwards, to wit, on the 25th day of *June*,
in

Sheriff

Sheriff

Sheriff of the
said county.

in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, at the request, cost and charges of the said *Richard*, the plaintiff in the said suit, by an indorsement on the back of the said writing obligatory, made and attested in the presence of two credible witnesses, sealed with *their* seal of office of *sheriffs*, assigned the said writing obligatory to the said *Richard*, according to the form of the statute in such case made and provided, as by the said assignment indorsed on the said writing obligatory, and duly stamped before the commencement of this suit, according to the form of the statute in that case made, and to the court now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by reason of which said premises, and by force of the statute in that case made and provided, an action hath accrued to the said *Richard*, as assignee of the said *Sir Robert Taylor* and *Benjamin Cole*, *sheriffs* of the said city of *Lon-* *don*, as aforesaid, to demand and have of the said *John* the said sum of 600*l.* above demanded: Nevertheless the said *John* (although often required), hath not paid the said 600*l.* above demanded, or any part thereof, to the said *Sir Robert Taylor* and *Benjamin Cole*, or to either of them, before the said assignment; or to the said *Richard*, assignee as aforesaid, since the said assignment, or to either of them, but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses; wherefore the said *Richard*, assignee as aforesaid, says he is injured, and hath sustained

Declaration
upon a bail-
bond against
one of the
bail,

damage to the value of 20*l.* and therefore he brings his suit, &c.

London, (H.) William Doe, late of *London*, grocer, was summoned to answer *Richard Fenn*, assignee of Sir *Robert Taylor*, Knight, and *Benjamin Cole*, Esquire, sheriffs of the said city of *London*, according to the form of the statute in such case made and provided, of a plea, that he render to the said *Richard*, assignee as aforesaid, 600*l.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him; and whereupon the said *Richard*, by *J. B.* his attorney, complains, *That whereas*, the said *Richard* heretofore, to wit, on the 5th day of *June*, in the year of our Lord 1783, sued forth out of the said court of our said Lord the King of the Bench here (the said court being then and now at *Westminster*, in the said county of *Middlesex*), a certain writ of our Lord the King, called a *capias ad respondendum*, directed to the said sheriffs, by which said writ,

said sheriffs were commanded to take one *John Denn*, if he should be found in their bailiwick, and him safely keep, so that they might have his body before his Majesty's justices at *Westminster*, on the morrow of the *Holy Trinity* then next following, to answer the said *Richard* in a plea of trespass; and also that the said *John* might answer the said *Richard*, according to the custom of the court of our Lord the King of Common-Bench here, in a certain plea of debt upon demand for 600*l.* and that the said sheriffs should have there that writ; which said writ,

afterwards and before the delivery thereof to the said sheriffs for execution, as hereafter is mentioned, was duly marked or indorsed for bail for 300*l.* by virtue of an affidavit made and filed in the said court, of the cause of action of the said *Richard* in that behalf, according to the form of the statute in that case made and provided, which said writ, so indorsed afterwards and before the return thereof, to wit, on the 14th day of *June*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was delivered to the said Sir *Robert Taylor* and *Benjamin Cole*, then and still being sheriffs of the said city, to be executed in due form of law; by virtue of which said writ, the said Sir *Robert Taylor* and *Benjamin Cole*, sheriffs as aforesaid, afterwards and before the return of the said writ, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took and arrested the said *John Denn*, by his body, and then and there had and detained him in their custody, at the suit of the said *Richard*, for the cause aforesaid; and the said *John Denn* being so arrested, and in custody of the said Sir *Robert Taylor* and *Benjamin Cole*, sheriffs as aforesaid, afterwards and before the return of the said writ, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took bail for the appearance of the said *John Denn*, at the return of the said writ, and on that occasion the said *William Doe*, as bail or surety of the said *John*, on the said 14th day of *June*,

Declarations in Debt

in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, by his certain writing obligatory, commonly called a bail-bond, sealed with his seal, and now shewn to the court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said Sir *Robert Taylor* and *Benjamin Cole*, sheriffs of the said city of *London*, by the names of Sir *Robert Taylor*, Knight, and *Benjamin Cole*, Esquire, sheriffs of the city of *London*, in the sum of 600*l.* of good and lawful money of *Great Britain*, to be paid to the said sheriffs, or their certain attorney, executors, administrators, or assigns, when he the said *William* should be thereunto required, with a condition to the said writing obligatory underwritten, that if the said *John* should appear before the justices of our Lord the King at *Westminster*, on the morrow of the *Holy Trinity*, to answer to the said *Richard* in a plea of trespass; and also that the said *John* might answer the said *Richard*, according to the custom of his Majesty's court of Common-Bench here, in a certain plea of debt upon demand, for 600*l.*; that then the said obligation should be void, and of no force, otherwise should stand and remain in full force, vigour, and effect, as by the said writing obligatory, and the said condition thereof, relation being thereunto had, will more fully appear; which said writing obligatory, with the condition thereunder written, was taken by the said sheriffs, by virtue of the said writ, and by force of the statute in such case lately made and provided;

vided; and the said *Richard* in fact saith, That the said *John* did not appear before his Majesty's justices at *Westminster*, on the morrow of the *Holy Trinity*, in the condition aforesaid mentioned, according to the exigency of the said writ, whereby the said writing obligatory became forfeited, and the said sum of money therein mentioned, or any part thereof, not being paid to the said sheriffs, the said *Sir Robert Taylor* and *Benjamin Cole*, then and now being sheriffs of the said city of *London*, afterwards, to wit, on the 25th day of *June*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, at the request, cost, and charges of the said *Richard*, the plaintiff in the said suit, by an indorsement on the back of the said writing obligatory, made and attested in the presence of two credible witnesses, sealed with their seal of office of sheriffs, assigned the said writing obligatory to the said *Richard*, according to the form of the statute in such case made and provided, as by the said assignment indorsed on the said writing obligatory, and duly stamped before the commencement of this suit, according to the form of the statute in that case made and provided, and to the court now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by reason of which said premises, and according to the form of the statute in that case made and provided, an action hath accrued to the said *Richard*, as assignee of the said *Sir Robert Taylor* and *Benjamin Cole*, sheriffs of the said city of *London* as aforesaid, to demand and have of the said

William

William the said sum of 600*l.* above demanded: *Nevertheless*, the said *William* (although often required) hath not yet paid the said 600*l.* above demanded, or any part thereof to the said Sir *Robert Taylor* and *Benjamin Cole*, or to either of them, before the said assignment; or to the said *Richard*, assignee as aforesaid since the said assignment, or to either of them, but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses; wherefore the said *Richard*, assignee as aforesaid, says he is injured, and hath sustained damage to the value of 20*l.* and therefore he brings his suit, &c.

If by the late
sheriffs.

If the bond be assigned by the late *sheriffs* (add that word), and that they as late *sheriffs* assigned the same to the plaintiff; and instead of the words *now being sheriffs*, say (*then being sheriffs*), and the venue may be laid in *London*, although the arrest and assignment was made in the country. 2 *Lord Raym.* 1455. 2 *Str.* 727.

Declarations in Trespafs and Assault.

Declaration
for a common
assault.

MIDDLESEX, (ff.) *Richard Fenn*, late of *London*, yeoman, was attached to answer *John Denn*, of a plea wherefore, with force and arms, he made an assault on the said *John*, to wit, at *Westminster*, in the said county, and there beat, bruised, wounded, and ill-treated him, so that his life was thereby in great danger, and there did other wrongs to the said *John*, to the great damage of the said *John*, and against the peace of our Lord
the

the now King, &c. ; and whereupon the said *John Denn*, by *James March* his attorney, complains, *For that* the said *Richard*, on the first day of *October*, in the year of our Lord 1783, with force and arms, to wit, with swords, staves, sticks, and fists, made an assault on the said *John*, to wit, at *Westminster*, in the said county, and then and there beat, bruised, wounded, and ill-treated him, so that his life was thereby in great danger, and then and there did other wrongs to the said *John*, to the great damage of the said *John*, and against the peace of our Lord the now King, &c. wherefore the said *John* saith, That he is injured, and hath sustained damage to the value of 20*l*. and therefore he brings his writ, &c.

Middlesex, to wit, *Richard Fenn*, late of *Westminster*, in the said county yeoman, was attached to answer *John Denn*, in a plea, wherefore with force and arms he made an assault on the said *Richard*, to wit, at *Westminster*, in the said county, and beat, bruised, wounded, and ill-treated him, and there imprisoned him, and kept and detained him in prison there, for a long time, without any reasonable or probable cause whatsoever, contrary to the laws and customs of this realm, and against the will of the said *John*, and there did other wrongs to the said *John*, to the great damage of the said *John*, and against the peace of our Lord the now King, &c. and thereupon the said *John*, by *J. L.* his attorney, complains, *For that* the said *Richard*, on the first day of *November*, in the year of our Lord 1783, to wit,

at

For an assault and imprisonment.

Declarations in Trespass.

at *Westminster*, in the said county, with force and arms, to wit, with swords, staves, and sticks, made an assault on the said *Richard*, and then and there beat, bruised, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison for a long time, to wit, for the space of five hours then next following, without any reasonable or probable cause whatsoever, contrary to the laws and customs of this realm, and against the will of the said *John*, and then and there did other wrongs to the said *John*, against the peace of our Lord the now King, &c. wherefore the said *John* saith, That he is injured, and hath sustained damage to the value of 5*l.* and therefore he brings his suit, &c.

Trespass for breaking, and entering close with cattle, poaching and spoiling the earth, and breaking the gates, &c.

Oxfordshire, (ff.) *Richard Fenn*, late of *Witney*, in the said county, yeoman, was attached to answer *John Denn*, in a plea, wherefore, with force and arms, &c. he broke and entered the close of the said *John*, situate, lying, and being in the parish of *Burford*, in the said county, and trod down, consumed, and spoiled the grass of the said *John*, there growing, of the value of 1*l.* with his feet in walking, and with certain cattle, eat up, trod down, consumed, and spoiled other the grass of the said *John*, there also growing, of the value of other 1*l.* and with the feet of the said cattle, poached and spoiled the earth and soil of the said *John*, and with spades, pick-axes, and other iron instruments, dug up, turned up, and rooted up, the earth and soil of the said *John*, of the value of other 1*l.* in the said close, and the gates, posts, pales, and

and rails, of the said *John*, there erected, standing, and being, cut down, broke down, prostrated, and destroyed; and other wrongs to the said *John* there did, to the great damage of the said *John*, and against the peace of our Lord the now King; and whereupon the said *John*, by *S. W.* his attorney, complains, *For that* the said *Richard*, on the first day of *January*, in the year of our Lord 1783, with force and arms, &c. broke and entered the close of the said *John*, called the Butts, situate, lying, and being in the parish of *Burford*, in the said county, and trod down, consumed, and spoiled the grass of the said *John* there then growing, of the value of 10*l.* with their feet in walking, and with certain cattle, to wit, horses, mares, geldings, and sheep, eat up, trod down, consumed, and spoiled other the grass of the said *John*, there then growing, of the value of other 10*l.* and with the feet of the said cattle poached and spoiled the earth and soil, to wit, five hundred perches of the earth, and five hundred perches of the soil, of the said *John* there, and the gates, posts, pales, and rails of him the said *John*, to wit, fifty gates, fifty posts, fifty pales. and fifty rails, of the said *John*, then and there erected, standing, and being, cut down, broke down, prostrated, and destroyed: and there did other wrongs to the said *John*, to the great damage of the said *John*, and against the peace of our Lord the now King, &c. To the said *John* his damage of 100*l.* and therefore he brings his suit, &c.

Venue.

Venue.

VENUE (*vicinetum*, or *visnetum*) is the place from whence a jury are to come for the trial of causes, which is generally some neighbouring place, *Locus quem vicini habitant*, from whence it is called *vicinetum*, or *venue*.

General rule of law respecting the venue.

The general rule of law, as laid down by Lord Coke, is, That every trial shall be out of that *town, parish, or hamlet, or place known*, out of the *town, &c.* within which the *matter of fact issuable* is alledged, that is most certain and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact. *Co. Litt.* 125. a.

Many niceties got over.

Many niceties which were formerly to be observed with respect to laying the *venue*; are now removed by the 4 & 5 Ann. c. 16. which enacts, "That every *venire facias*, for the trial of "any issue, shall be awarded of the body of the "proper county where such issue is triable." *Alto see stat.* 24 Geo. 2. c. 18. with respect to penal actions.

Real actions to be laid in the proper county.

All actions, real or mixed, as trespass, *quare clausum fregit*, *ejectment*, *waste*, &c. must be laid in the *county* where the *lands lie*. *Braet.* 189. 4:4. So debt for rent, against an assignee of a term, on the privity of estate, is local, and will lie no where but in that county where the lands are. *Crc. Car.* 183. *Latch.* 187. *Jon.* 43. Debt upon escape is also local. 2 *Litt. lib.* 782.

Personal actions not.

All personal actions, as debt, detinue, assault, deceit, trover, and conversion, account, slander, and

and the like, the plaintiff may declare in what county he pleases. *Co. Lit.* 282. So against a sheriff for a false return. *1 Wils.* 136. If a personal action be founded upon a thing done out of the realm, it may be brought in any county, and shall be alledged at such a place, in such a county: as if debt be upon a bond or bill made at *Hamburgh*, it may be alledged at *H.* viz. at *Islington*, in the county of *Middlesex*. *Latch.* 4. *Salk.* 660. So upon bond. *Salk.* 659. *Lutw.* 950. *2 Cro.* 76.

When an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county or the other, *7 Co.* 2. *a.* *Dy.* 38. *b.* 40. *a.* As if an arrest be in one county, and an escape in another, *1 Lev.* 114. So in an action for a false return of *non est inventus*, where the sheriff was in company of the party, *2 Mod.* 23. So if the matter in one county is dependant upon matter in another, the plaintiff may have the action in the one county or the other. *7 Co.* 1. *b.* As if two conspire to indict another, and make the execution of the conspiracy in another county, conspiracy lies in the one county or the other. *7 Co.* 1. *b.* So for maliciously suing an execution in *Middlesex*, whereby he was arrested in *Dorsetshire*. *Cro. Eliz.* 574. So if an action on the case be against the sheriff of *Denbighshire*, for not arrelting a man upon a *capias ut lagatum* to him directed in *Denbighshire*, upon which he returned *non est inventus*, it may be in *Denbighshire*, or in *Middlesex*, where the return was made. *Hob.* 209.

If an assault and imprisonment happens at *Minorca*, it may be laid at *London*, in the parish of *St. Mary le Bow*, in the ward of *Cheap.* *Fabrics*

When the action is founded on two things, in different counties, how to be brought.

If assault happen abroad, may lay venue in London.

Fabricas v. Moslyn Hil. T. 1775; and if the plaintiff was banished from *Minorca* to *Carthagena*, it may be laid in *Minorca*, to wit, at *London*, &c.

Actions on
penal statutes
be binding in
their proper
county.

By *Stat. 21 Jac. 1. c. 4.* "All suits on penal statutes shall be laid in their proper county, and if on the general issue pleaded, the offence be not proved in the same county in which it is laid, the defendant shall be found not guilty."

Construction
of the act.

This act does not extend to any offence created *since* the statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is as to them as it were repealed *pro tanto*. 1 *Salk.* 372. by ten judges. Secondly, That all informations and popular actions in penal statutes made, before that act, must by force of *21 Jac. 1. c. 4.* be laid, brought, and prosecuted in the proper county where the fact was done. *ibid.* *Bunbury* 236.

So against
officers, &c.

"So if actions are brought against any justice, mayor or bailiff of any city, town corporate, head-borough, portreeve, constable, tithing-man, collector of subsidy, fifteenths, churchwardens, and other persons called sworn men, executing the office of churchwarden or overseer of the poor, and their deputies, or any of them, or any other which in their aid and assistance, or by their commandment, &c. the venue must be laid where the fact was committed, or the defendant must be found not guilty." *Stat. 21 Jac. 1. c. 12. sect. 5. vide S.r. 446. Vaughan* 113.

Nuisance,
debt for rent,
local.

A nuisance must be laid in the proper county, and debt for rent against the assignee of a term on the privity of estate is local, and will lie no where but in the county where the lands are. *Cro. Car.* 133. *Jones* 43. But debt for rent against the lessee may either be laid

laid where the land lies, or the deed was made. *Str.* 776.

Where the evidence necessary to support the action arises in two counties, the plaintiff may lay the venue in which county he will. *Salk.* 669.

Foster moved to change the venue from London to Oxford on the common affidavit; *Walker* shewed for cause, it was a contract to be performed in *Cambridgeshire*, being a wager laid at Oxford, on the running of a horse at *Newmarket*, and cited 1 *Wils.* 178. *sed non al-locatur*; for *per cur.* it is clear the venue ought not to be laid in London; and *Cambridgeshire* is a third county to which the record is hitherto a stranger. Had the venue been laid there, we probably should not have changed it. Rule absolute.

Of changing the Venue in transitory Actions.

THE stat. of 6 R. 2. c. 2. having ordered all writs to be laid in their proper counties, this, as the judges conceived, impowered them to change the venue, if required, and not to insist rigidly on abating the writ, which practice began in the reign of *James* the First, 2 *Salk.* 670. and this power is discretionally exercised, so as not to cause but prevent a defect of justice, therefore the court will not change the venue to any of the four northern counties, previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit, 1 *Wils.* 138. *Str.* 480.; nor can it be changed,

When plain-
iff may lay
his venue
where he
pleases.

Cause of ac-
tion arising in
two counties,
the venue
shall not be
laid in a
third.

Court will
not change
the venue to
any of the
four northern
counties pre-
vious to
the spring
circuit.

ed, but to a county where the whole cause of action arose. 1 *Wils.* 178.

In what cases venue cannot be changed.

The *venue* is not changeable in an action for *scand. magnatum*, promissory note, or bill of exchange. *Lev.* 56. *Carth.* 400. *Vent.* 363. *Barnes* 482. 492. So in covenant, for the *venue* cannot be changed if on a specialty. *Leo.* 307. *Barnes* 491. 2 *Str.* 878. So in covenant for non-payment of rent. *Barnes* 491. So in an action for a false return. *Salk.* 669. But it is laid down in *Burr.* 1564. with good reason, that in transitory actions the court ought to change the *venue*, when it appears upon the circumstances laid before them, that there is a probable ground to apprehend that a fair, impartial, or at least a satisfactory trial cannot be had.

If the cause of action arises in Wales, and the venue in London, it may be changed into the next English county.

If the cause of action arises in *Wales*, and the *venue* laid in *London*, the court will, on affidavit, order the *venue* to be changed into the next *English* county; and the motion must be to change it into the *Welsh* county, and not into the adjoining *English* county, because the affidavit must express in what county, and not *elsewhere*, the cause of action arises: but after the *venue* is so changed, the cause may be tried in the next adjoining *English* county; and therefore it cannot be changed out of the adjoining *English* county into *Wales*. 2 *Black. Rep.* 962.

Cannot be changed into a county palatine, but may be to Chester.

The *venue* cannot be changed into a county palatine, *Barnes* 470. 488. but it was changed into *Chester*, because the court can send down the record by *mittimus*. *Lord Raym.* 1418. 1 *Wils.* 122.

The

The *venue* may not be changed from a county at large into a city and county; it may be *changed from* *Barnes* 388.; but it has been changed from a county at large into *London*, *ibid.*; and it may be changed from one county and city into another county and city, *Prac. Reg. C. P.* 429.; but it cannot be changed into *Hull*, *Canterbury*, &c. because it is not known when an assize will be held there; nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and county at large are held at the same place: but the reporter says, all this is in the discretion of the court. *Barnes* 490.

If the cause of action arises in *Berwick only*, If cause of action arises in *Berwick*, the *venue*, it seems, should be in *Northumberland*. 2 *Black. Rep.* 1036. the *venue* must be in *Northumberland*.

Action by attorney on a promissory note and other counts, motion to change the *venue* from *Middlesex* to *Stafford* on the usual affidavit, 2 *Barnes* 390. 392. were cited. *Davy* shewed cause, and undertook to give evidence on the note. Rule discharged. 2 *Black. Rep.* 993. *Venue not changed in actions on promissory note.*

An attorney has no privilege to have the *venue* changed into *Middlesex*, where he is defendant, though he has a privilege when plaintiff, to lay it and keep it there (unless he sues in *auter droit* as executor, &c. or jointly with another person), the privilege is lost: Serjeants and officers of the court have the like privilege. *Barnes* 493. *Rep. & Cas. Pract. C. P.* 145. *Barnes* 479. 480. 482. *Pract. Reg.* 419. 4 *Burr.* 2027. *Attorney has no privilege to change the venue if in Middlesex, though he may keep it there, if plaintiff.*

If serjeants,
 &c. sue by
capias, the
venue may be
 changed.

But if a serjeant at law, or an attorney, be plaintiff, and sues by a *capias*, and not by writ of privilege, the *venue* may be changed, for he has thereby waived his privilege, and is to be considered only as a common person.

Pract. Reg. 420. *Barnes* 346.

If an attorney
 is plaintiff,
 the *venue*
 cannot be
 changed.

Action retained in *Middlesex*, on motion to change the *venue* into *Worcestershire*, in right of plaintiff's privilege as an attorney, though attachment was not a *testatum out* of *Middlesex*. *Barnes* 493.

Within what Time the Venue may be changed.

When the *venue* may be changed.

THE defendant cannot move to change the *venue* in any action until his appearance be entered. *R. E.* 24. *Cb.* 2.

Venue, where changeable in transitory actions.

"That although the declaration be delivered seven days before the last day of the next precedent term, or after, yet before plea, upon oath made, the *venue* may be changed upon motion in the said transitory actions the next term after, and the defendant to plead to the new action as he should have done, without delay." *R. Mich.*

When to plead thereto.

1654. *sett.* 8. "That the *venue* may be changed (upon oath), though the defendant come in by exigent." *ibid.*

May be changed, if defendant comes in by exigent.

Venue may be changed before plea.

By rule, *Mich.* 16 *Geo.* 2. "It is ordered, That any defendant may move to change the *venue* at any time before plea pleaded, in all such actions where the *venue* may be changed by the course of this court, notwithstanding such defendant or defendants may have applied for, and obtained further time to plead before such motion."

It has been held, that a summons or order ^{Summons and} for time to plead shall be no bar to a motion ^{order no bar,} to change the *venue*, nor alter an order for an imparlance. *Barnes* 487. 489.

But on application to change the *venue* unless rejoin-
after a judge had given an order for time to ^{ing gratis,}
plead, defendant consenting to rejoin ^{and taking} *gratis*, ^{short notice of}
and take notice of trial at the sitting after trial.
term, the court held it came too late, and
that defendant's consent should bind him.
Barnes 493.

The defendants having put in their plea, If plea be put
after a rule to shew cause why the *venue* ^{in, the venue}
should not be changed, and before it was ^{may be}
made absolute, the court held, that the put- ^{changed with}
ting in the plea by inadvertency was no ^{drawing the}
waiver of the rule, and gave the defendants ^{plea, and}
leave to withdraw their plea on payment of ^{pleading de}
costs, and made the rule for changing the ^{novo.}
venue absolute. *Barnes* 360.

If the declaration be delivered so late ^{May move to}
that the plaintiff cannot move *before* the *last* ^{change the}
day of the term, he may move it then. *Barnes* ^{venue the last}
489. ^{day of term.}

The Method of moving to change the *Venue.*

NO notice is necessary to be given to ^{How to move}
the plaintiff's attorney, previous to the mo- ^{to change the}
tion to change the *venue*, but the client ^{venue.}
makes the following affidavit; which give to
a serjeant, with 10s. 6d. for him to move
for that purpose; the rule is not absolute
in the first instance, therefore in the evening

draw up rule, pay for same 5 s. inspecting the declaration, 1 s. filing affidavit, if sworn in the country, 2 s. serve it on plaintiff's attorney, and shew the original; which being done, make affidavit of such service, "and shewing the original rule," give it to a serjeant on the day of shewing cause, with a fee to make it absolute, of 10 s. 6 d.; when done, draw up the absolute rule, and serve it, pay 4 s. 6 d. the plaintiff's attorney then will call, and alter the declaration with you,

In the Common Pleas.

John Denn, Plaintiff,
and

Richard Fenn, Defendant.

Affidavit.

Richard Fenn, of Bread-street, London, saith, the above defendant, maketh oath and faith, That the plaintiff's cause of action (if any) arose in the county of *A.* and not in the county of *B.* as laid in the declaration, or elsewhere out of the county of *A.*

Upon plaintiff's undertaking to give evidence of some matter in issue arising in the county, the rule to change the venue will be discharged.

Notwithstanding the defendant has it in his power to remove the venue from the place laid, to the place where the cause of action arose, the plaintiff may, on shewing cause, "undertake to give material evidence of some matter in issue, arising in the county wherein the action is laid;" in that case, the rule will be discharged; but if at the trial he fails therein, he must be nonsuited. 2 Black. Rep. 1031. For it is not enough to say, that the witnesses to prove the contract resided there. *Ibid.*

How to change the venue in vacation.

If the defendant wants to change the venue in vacation, he may, upon producing the

the usual affidavit, obtain a judge's summons for that purpose; and on attendance, the judge will make an order for the rule, upon producing a serjeant's hand to a brief. Pay for the order 2 s. rule, 4 s. 6 d. filing order, 1 s.; serve it on plaintiff's attorney.

Originally it was required, that the plaintiff should give no evidence at the trial, but what arose in the county wherein the *venue* was retained. 1 *Keb.* 189. 1 *Sid.* 442. If he gave none such, he must have been nonsuited of course. But when it was laid down in *Swain's* case, 1 *Sid.* 405. that the plaintiff might lay his *venue* in any county wherein part of the cause of action arose, he was then bound only to give some evidence, and not the whole (*dare aliquam evidentiam*), in the county where the *venue* was laid. *Salk.* 669. 12 *Mod.* 515. which continues to be the rule at this day. And if the plaintiff fails to make good his undertaking, he is nonsuited now, which has the same effect as judgment for the defendant in a plea in abatement, viz. *quod eat sine die*, and the plaintiff must begin again. 2 *Black. Rep.* 1034.

Where a rule is made to change a *venue*, and afterwards the plaintiff would bring it back again, the rule must be, *dare aliquam evidentiam de materia in exitu*, in the county where the action was brought. *Salk.* 669.

Formerly it was required to give evidence in the county where the *venue* was retained, or be nonsuited.

But since bound only to give some evidence,

or be nonsuited.

If after rule to change, the plaintiff asserts to bring *venue* back, must give evidence of some matter in that county

Rule to plead.

MAKE out on a piece of paper, without a stamp, your rules to plead, thus :

Denn v. Fenn. } Rules to plead.
Doe v. Roe. } A. K. Attorney.

6 Nov. 1783.

Which take to the Secondaries office, to Mr. Skinn, pay him for the entry 1 s. 10 d. 1 s. 6 d. for the stamp, and 4 d. for the entry in his book; the rule expires in four days, *inclusive of the day whereon it is given*. But judgment may not be signed till the afternoon of the next day. *R. Mich. 1654. 1 s. 15.*

Sunday, or any *holiday*, on which the court *does not sit*, is reckoned a day within the said rule (except it happens to be the *first or last* of the *four days*). If the rule be given on the *Purification*, that is reckoned no day.

The rule may be given any time *in term*, or *four days* after.

How to ap-
ply, if time is
wanted.

Where defendant wants time to plead, he may take out a judge's summons for that purpose, pay 2 s. serve plaintiff's attorney with a copy, and attend thereon; and if the cause is to be tried in *London* or *Middlesex*, and the plaintiff is in time to try his cause, the judge will bind down the defendant to terms of "*pleading issuably, rejoining gratis, and taking short notice of trial;*" (if not) *only pleading issuably*.

Cannot

Cannot apply for a summons after the time is out for pleading, as it is no stay of proceeding. *Barnes* 254. Summons, if time is out, is no stay.

If four terms are elapsed, after declaration delivered, the defendant must have a whole term's notice to plead, unless the cause is stayed by injunction or privilege; and in this case, you give defendant's attorney notice before the effoign day of the term, that you intend to proceed in the cause, "by giving a rule to plead," and the first day of the term give your rule. When a term's rule must be given.

Where a rule to plead has been given, and defendant obtains an order, or is bound by rule of court to plead by a certain time, as for instance, the first day of next term, plaintiff may sign judgment, on default of defendant's pleading, without giving a new rule. *Rep. & Cas. of Pract. C. P.* 67. 141. Where rule is given, need not give a fresh one the next term.

Where plaintiff has given a rule to plead, and has been delayed from signing judgment by an injunction out of chancery, after the injunction has been dissolved, he may sign judgment, without giving a new rule. *Barnes* 157. May sign judgment, if the rule has been given, although there has been an injunction.

If defendant does not plead according to the rules of court, so that plaintiff may enter judgment by *nil dicit*, yet, if after the rules are out, the defendant do put in his plea, before the plaintiff hath entered his judgment, such plea is to be accepted, and the plaintiff ought not then to enter his judgment. If he does, on application to the court, such judgment will be set aside for irregularity. *Lill. Reg.* 295. *Suppl.* 10 2 *Barnes* 39. After rule to plead expires, and no judgment signed, it is a good plea if filed or delivered.

To

Rule may be
given on es-
soign day.

To prevent inconvenience, the secondaries will accept rules to plead on the *essoign day*, but they cannot be entered only as of the *first day of term*.

When to Plead.

Within what
time to plead.

ON all process returnable the *first*, *second*, or *third return* of any term, if plaintiff declares in *London* or *Middlesex*, and defendant lives within *twenty miles of London*, the defendant shall plead within *four days*. And in case the plaintiff declares in any *other county*, or the defendant lives above *twenty miles from London*, the defendant shall plead within *eight days* after declaration delivered, with notice to plead, without imparlance. *R. Trin. 8. Geo. 3.*

But such declaration must be delivered *four days* before the end of the term in which the writ is returnable, exclusive of the day of delivery, to have a plea of that term; and where the process is returnable, the third return of any term (except it be *Easter term*), the declaration must be delivered *de bene esse*, to have a plea of that term, else there will not be time.

When intitled
to an impar-
lance.

But if declaration be delivered on process returnable on any *other return*, the defendant is intitled to an *imparlance* of course, and need not plead till the *first four days* of the *next term*, nor take out a summons for an imparlance.

Appearance
entred, or
bail put in
time, need
not plead
till demand
made.

If the defendant appears in time, or puts in special bail, he need not plead until a demand be made of such plea, and the demand indorsed on the back of the declaration is sufficient (except where a prisoner is defendant). *Barnes 276.*

A plea

A plea in abatement must be pleaded When to within the *first four days* after the declaration plead in is delivered, or left in the office, although abatement. no rule to plead be given, or else the defendant must, within that time, procure a special imparlance; and a plea in abatement otherwise pleaded is a mere nullity, and the plaintiff may sign judgment. *Barnes* 331, 334.

Tender ought to be pleaded *within four days* after declaration delivered, if delivered Tender ought to be pleaded within four days. before *four days* of the *end* of the *term*; but if not, then it may be pleaded within *four days* of the *next term*, as a *plea of the last term*. *2 Barnes* 284. *Vide* title *Tender*; may now be pleaded after a judge's order, as of the term declaration is delivered.

Demand of Plea.

WHEN declaration has been delivered Demand of to defendant's attorney (or, in case he has plea. appeared in time), a demand must be made of a plea before judgment can be signed (although notice has been given of a declaration being filed); and such demand must be in writing.

A demand of plea, indorsed on the back of declaration, held irregular, and judgment set aside; for it must be made after declaration delivered, and rule to plead given. *Barnes* 276.

In the Common Pleas. *Denn v. Fenn.*

A demand of plea. The plaintiff demands a plea in this cause, otherwise judgment.

Yours, &c.

Mr. J. B. Attorney for the Defendant. J. K. Attorney for Plaintiff.

How long to plead after demand made. If the rule to plead be out before demand made, the defendant has only to the afternoon of the next day to plead.

Demand of a plea waiver of the bail, unless perfected. The demand of a plea before bail is justified, is a waiver of them; therefore take care bail is complete before such time as you demand the plea.

To be given in town to the agent. It should be given to the agent in town, and not to the country attorney; and a plea delivered in the country is irregular. *Barnes* 251.

Imparlanee.

When defendant intitled to an imparlanee. WHERE the writ is returnable the *first*, *second*, or *third* return of the *term*, if the declaration be not filed, and also notice of filing given before the last *four days* of the *term* in which the writ is returnable, defendant is entitled to an *imparlanee* of course; and if returnable on the *last* return, defendant is also entitled to an *imparlanee*.

Special imparlanee. If the writ be returnable in *Michaelmas term*, and plaintiff does not deliver or file his declaration before the *essoign* day of *Hilary*, the defendant is intitled to an *imparlanee*.

If defendant pleads in abatement in a subsequent term, a special *imparlanee* must be procured within the *first four days*, which the prothonotary

prothonotary grants of course, if the defendant is entitled. *Pract. Reg.* 1. *Barnes* 334.

Imparances upon particular circumstances are discretionary in the court. *Barnes* 224, 225. And an imparance so special as to save all exceptions to the jurisdiction of the court, cannot be entred without leave of the court; nor can a plea to the jurisdiction be pleaded, after an appearance by attorney. *2 Black. Rep.* 1094. Discretionary.

There cannot be any necessity for a special imparance to be entred, as that may be saved, by intitling the plea the same term the declaration is delivered; but if it is insisted on, the prothonotary will grant one on payment of 2 s.

Searching for Plea.

TO be searched for at the prothonotary's, in *Tanfield Court, Temple* (who keeps a book for that purpose), by the defendant's name. If no plea there, and none is delivered in due time, sign judgment; the forms of which you will find under title *Judgment by Default*. Searching for plea.

Pleas in Abatement when to be pleaded.

A PLEA in Abatement must be pleaded within the first four days after the declaration delivered or filed, although no rule to plead be given, or else the defendant must, within that time, procure a special imparance; and
1
a plea

a plea in abatement otherwise pleaded is a mere nullity, and the plaintiff may sign judgment. *Barnes* 331. 334. *Pract. Reg. C. P.* 286.

But if the declaration be delivered or filed so late in term, that the defendant is not bound to plead to it that term, he may, within the *first four days* inclusive of the next term, plead any plea in abatement, or to the jurisdiction of the court, *as of the preceding term.* *Barnes* 334.

No plea without affidavit. *By Stat. 4 & 5 Ann. c. 16.* "No dilatory plea shall be received, unless the party, by affidavit; prove the truth thereof, or shew some probable matter, to induce the court to believe that it is true."

It must be signed by a serjeant; and without an affidavit of the truth thereof annexed, judgment may be signed, as if no such plea had been delivered or filed.

Cannot plead two dilatory pleas. A defendant cannot plead two dilatory pleas, nor will the court suffer a plea in abatement to be amended; and if the plea be true, the plaintiff may enter *a nil capiat per breve*, without paying of costs. 1 *Barnes* 92. 190.

Declaration of *Hilary term* without any imparlance, defendant pleaded in abatement *four days within Easter*, but had got no special imparlance from the prothonotary till eight days within the term; *per cur.* he ought to have pleaded within *four days of Easter term*; and also should have got a special imparlance within the four days. *P. Reg.* 1. *Barnes* 334. *Napper v. Biddle.*

All

All pleas in abatement (unless to the jurisdiction and privilege) may be pleaded after special imparlance. Gilb. C. P. 184.

Demanding Oyer:

By Rule Mich. 1654, sect. 15. "That when a deed, will, or letters of administration, are to be shewn in a declaration, the attorney of the plaintiff delivering a declaration with a subscription, that the defendant shall not be compelled to plead till the same be shewn, no judgment by *nil dicit* to be entered against the defendant till the same shewn; nor any nonsuit upon the plaintiff, if he shew the same before the end of the next term."

If the action is on a bond, deed, or other specialty, the defendant may demand oyer of the same; and he shall have as many days to plead after oyer given, as he had to plead at the time oyer was demanded.

Barnes 238, 254.

If oyer be demanded after the rule to plead is out, the plaintiff may sign judgment notwithstanding; but if the defendant has eight days to plead, he may demand oyer at any time within the eight days, notwithstanding the four-day rule to plead is expired. *Barnes* 265. 2 *Wils.* 413.

If the defendant prays oyer, and copy of a bond, &c. he is entitled to inspect it, and have a copy of the whole, with the witnesses names, and all memorandums subscribed and indorsed.

The defendant pleaded a release, with a *presert hic in curia*; on the 12th of November the

deliver oyer
of a deed
pleaded by
him.

the plaintiff craved oyer, and on the 14th signed judgment, for want of oyer given him; and it was held that this judgment was regularly signed, that from the 12th to the 14th was a reasonable time for the defendant to give the plaintiff oyer, and that the plaintiff had no need to apply to the court to set aside the plea; for after oyer craved by the plaintiff, the defendant is bound to verify his plea. *Pract. Reg.* 245. *Rep. & Cas. Pract. C. P.* 95.

Demands,
&c. to be in
writing.

Declarations, pleas, replications, and other pleadings, and also oyer of writs, bonds, and other deeds, shall be demanded by a note in writing. Note fixed in the office. *Mi. 1 Geo. 2.*

N. B. The defendant cannot now have oyer of an original, 2 *Wilson* 394. because the defendant comes in upon *meine* process, as the *capias*, &c. and there is no original writ issued out at the beginning of the suit, as there used to be.

In the Common Pleas.

Denn v. Fenn.

The demand.

The defendant demands oyer, and copy of the writing obligatory in the declaration mentioned, and of the condition thereof.

Yours,

To Mr. C. D. Attorney
for the Plaintiff.

J. K. Attorney for
the Defendant.

What plea
cannot be
pleaded with-
out demand-
ing of oyer.

The defendant cannot plead, that no such letters of administration, as set forth in the declaration, were ever granted to the plaintiff, without craving oyer thereof, and setting them out in his plea. 2 *Wils.* 413.

How oyer is
to be given.

The defendant must pay for oyer and copy, 4 *d.* per sheet, or the plaintiff may sign

sign judgment; and it is given on plain paper.

If the defendant makes a profert, and plaintiff demands oyer, the defendant must give it the day after the demand. 1 Barnes 168.

If defendant makes profert, it must be given on the day after demand.

Where a record of the same court is pleaded in abatement, and the plaintiff demands oyer of that record, and it is not given him in convenient time, the plea ought not to be received, but the plaintiff may sign his judgment; and the rule was, that unless the defendant gave oyer of the record the next day, judgment should be for the plaintiff. *Carth.* 454, 517. *Ld. Ray.* 347.

When a record in the same court is pleaded in abatement, oyer may be prayed, and if not given, judgment may be signed.

Where the bond or deed is in the hands of a third person, the court, on motion, will oblige him to give oyer, and produce it. *Str.* 1198. *Sid.* 50.

Oyer must be given, if in the hands of a third person.

If an indenture be lost, and there is a counterpart, the court will compel the party to shew his counterpart, and he plead thereto, otherwise they will grant an imparlance. *Cro. Jac.* 426. *Sid.* 386. *Keb.* 430.

If indenture lost, and there is a counterpart.

The plaintiff demands oyer, and copy of the deed mentioned in the plea of the defendant.

Demand of oyer of deed in the plea.

Yours, &c.

J. K. Attorney.

Pleas in Bar.

PLEAS in bar are to be pleaded within the time limited by the rule of *Trin.* 8 *Geo.* 3.

Pleas in bar;

U

(which

(which see, *under title Declaration*); and they are either to be delivered to the plaintiff's attorney, or filed with the prothonotaries, on a treble penny stamp paper (if it is the general issue, pay filing 2 s.); if a special plea. 8 d. *per sheet*; and if delivered to the plaintiff's attorney, pay nothing.

Defendant may, with leave of the court, plead double, &c.

By the *Stat. 4 Ann. c. 16*. "Any defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, with the leave of the same court, may plead as many several matters as he shall think necessary for his defence, provided that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given, at the discretion of the court; or if a verdict shall be found upon any issue in the said cause, for the plaintiff or defendant, costs shall be also given in the like manner, unless the judge who tried the said issue shall certify that the said defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which, upon the said issue, shall be found against him."

Construction of the act.

Upon the first part of this clause, it seems that the act does not extend to *qui tam actions*, so that in them there can be but one plea, 2 *H. 11* s. 21.; nor to any action on a penal statute. *Barnes* 15. 365.; nor to suits where the king is a party, unless for debt immediately owing on revenue, *sect. 24.*; and therefore in *quare impedit*, by the king, a rule to plead double was denied. *Barnes* 353.; ~~and determined, that it does not extend to plead double matters,~~ which shall have different trials; for instance, in dower—if the defendant pleads, "*ne unguis accipule in loyal matrimonio*," and a mortgage; for the first matter shall be tried by the

the bishop, and the other by a jury, and the judge cannot certify, if there was a probable cause. *Com. Rep.* 148.

Thirdly, That the certificate upon this statute may be made after the trial.

Formerly this court expected to be satisfied by affidavit of the necessity of pleading several pleas; but since have been led to think that they had been too nice in the construction of the act for pleading double, which seems to be general, and a remedial law. *Barnes* 347. And therefore now it is done upon motion to the court, who are to judge of the propriety thereof; and the defendant may move to plead any number of pleas, provided no two of them be inconsistent with each other.

But they will not suffer incompatible pleas to be pleaded, as *non assumpsit* and a tender, 2 *Black. Rep.* pleas not suffered. 723.; it only serves to lengthen the record, for it always concludes with a *non assumpsit* as to the residue of the demand; or *non est factum*, and *solvit post diem*, *ibid.* 905.; or *non est factum*, and *solvit ad diem*, *ibid.* 993; or *non assumpsit*, and alienage of plaintiff, *id.* 1326 or in dower, *ne unques jeise*, and *ne unques accoups* *ibid.* 1157. 1207.; *non assumpsit*, and a release *Barnes* 328; *non assumpsit*, *non assumpsit* in few arrears, and leave to bring money into court, *ibid.*; *non assumpsit* and infancy, *Barnes* 363.; *solvit ad diem*, and *riens per dissent*, *ibid.* 331; *alterum tenementum*, and a justification, *ibid.* 329.; *nil debet*, and *nil habuit in tenementis*, the latter may be given in evidence, *ibid.* 333.; not guilty, and *liberum tenementum*, *ibid.* 350.; not guilty, and that plaintiff became bankrupt, *ibid.* 350.; not guilty and a licence, *Barnes* 349. 364.; without affidavit, *ibid.* 357.; not guilty, and a release of a particular *ibid.* 317.

Pleas not requiring a serjeant's hand.

The following pleas do not require a serjeant's hand, viz.

<i>Comperuit ad diem,</i>	<i>Per minas,</i>
<i>Son assault demesne,</i>	<i>Solvit ad diem,</i>
<i>Plene administravit,</i>	<i>Ne unques executor,</i>
<i>Riens per discent,</i>	<i>Infra ætatem.</i>
<i>Nul tiel record.</i>	

Rep. and Caf. of Pract. C. B. 41. Prac. Reg. C. P. 282. Barnes 365. Nor do

<i>Ne unques administrator,</i>	<i>Non assumpsit,</i>
<i>Non est factum,</i>	<i>Not guilty, Barnes 365.</i>
<i>Nil debet,</i>	<i>Per dures :</i>

But *non assumpsit infra sex annos* does, *Cooke's Rep. 41.* So does a general performance of covenants. *Barnes 354.*

Double Pleas.

Double pleas to be signed.

DOUBLE pleas are all to be signed by a serjeant; and if delivered without a serjeant's hand, the plaintiff may sign judgment as if no plea had been delivered. *Prac. Reg. C. P. 4. 282. Cooke's Rep. 38.*; and where-ever the plea is signed by a serjeant, the replication must be likewise signed. *Barnes 365.*

Pleas allowed upon the first motion.

Double pleas allowed upon the first motion. *Non assumpsit*, and *non assumpsit infra sex annos*, *Barnes 829.* *Non assumpsit* and a discharge under the insolvent debtors act. *Ibid. 343.* In trespass, *non cul.* and *liberum tenementum alterius.* *Ibid. 336. 340. 351. 356.* *Solvit ad diem*, and a mutual debt, *ibid. 340.* *Non assumpsit* to the whole, and a tender. Damage feasant, and under a demise to the plaintiff, *Barnes 339.* Damage feasant, and for rent in arrears, *ibid. 340.* *Non assumpsit*, a set off and a tender, as of the last term. *Ibid. 353. 357. 360. 366.* *Non cepit*, cattle the property of another person, not of plaintiff, and *liberum tenementum.* *Ibid. 362. Non assumpsit,*

N. B. Give brief to a serjeant, 10s. 6d. draw a rule with secondary, and serve copy on plaintiff's attorney.

assumpsit, and *plene administravit* generally. *Ibid.* 348. *Plene administravit*, and a set off. *Ibid.* 347. *Ne unques executor*, and *plene administravit*. *Ibid.* 355. 365. *Non est factum*, and *ne unques executor*. *Ibid.* 352. *Non est factum*, and *durels*. *Ibid.* 359. Not guilty, and a general release. *Ibid.* 347, 348. Not guilty, and four guineas paid in satisfaction of all trespasses to such a time. *Ibid.* 349. Not guilty, *son assault*, and satisfaction for all trespasses. *Ibid.* 352. Not guilty, *son assault*, and *moliter manus imposituit*. *Ibid.* 351, 352. 354. Not guilty, and a justification in trespass. *Ibid.* 355, 356. 365. *Non cepit*, and to avow the taking. *Ibid.* 365. Not guilty to the whole, and a tender of amends. *Ibid.* 366.

If you plead double any other pleas, a motion must be made by a serjeant for that purpose; pay him 10s. 6d.; draw up rule in the evening with the secondary, pay according to the length; serve copy on plaintiff's attorney, and shew him the original rule; then on the day of shewing cause, give brief to a serjeant, with one guinea, first making an affidavit of the service of the rule annexed (add the words, "*and at the same time shewed him the original rule*") and when made absolute, draw up rule at the secondaries, make a copy thereof, and annex to the plea before it is filed or delivered; pay for rule according to the length: if you move to plead double, and pay money into court, these are separate motions.

If the defendant is not in time to plead before the time expires, he may apply to a judge, who will grant him a summons for that purpose; pay 2s. in term and vacation; serve copy on plaintiff's attorney, who will

How to plead double in term.

How to get time to plead in town causes.

indorse same; and if the action be in *London* or *Middlesex*, and there is not time to give full notice of trial after the time is expired, it must be upon terms "*of pleading issuably, rejoining gratis, and taking short notice of trial for the last sittings in term, or after, as the case happens;*" and it is to be remembered, that no plea but an issuable one can, after an order obtained, be pleaded, therefore a plea that the *plaintiff was an infant, and ought to sue by prochein amy*, *Barnes* 263. a recovery in another court, *3 Wils.* 33.; nor a general performance of covenants not signed by counsel, *Barnes* 354. are not within the order.

What is meant by an issuable plea.

What is meant by an issuable plea, is a plea in chief, upon which the plaintiff may take issue, *Barnes* 263.; by rejoining *gratis*, is meant rejoining without the common four-day rule, *Barnes* 271.; and taking short notice of trial, is two days at the least. *Barnes* 301.

Time to plead in country causes.

If it be a country cause, you obtain the like summons, on which an order will be made (if in time) before the assizes, of pleading issuably only: when a summons is indorsed or attendance made on the judge, draw up order, pay 2s.; make copy thereof, and serve same on plaintiff's attorney.

Month's time to plead is a lunar month.

A month's time to plead, means a *lunar month*; and so in all proceedings a month means *four weeks*. *3 Burr.* 1455.

Demurrer to the replication for delay is not within the order;

Defendant obtained an order for time to plead, pleading issuably, rejoining *gratis*, and taking short notice of trial within term: defendant pleaded accordingly, and plaintiff replied,

replied, and then defendant, instead of re-joining, demurred merely for delay; plaintiff not having time to set down the demurrer to be argued within term, signed judgment, which defendant moved to set aside; but upon hearing counsel on both sides, the court considered the defendant's practice to be a mere trick, and therefore denied the motion, *Barnes* 271.; but a demurrer to the merits is within the order, 2 *Black. Rep.* 923. and an issuable plea.

If judgment be set aside on the payment of costs, and pleading an issuable plea, the defendant cannot plead the statute of limitations; for it is not an issuable plea, within the meaning of the rule for setting aside the judgment. *Barnes* 253. 256.

A judge's summons stays nothing, unless it be returnable before the judgment be regularly signed; and if judgment is regularly signed, before the summons for time to plead is returnable, the court will not set it aside, especially if defendant has no merits. 2 *Black. Rep.* 954.

The defendant, although he has had one order, if more time can be given him, may have a second and third summons for that purpose; so that the plaintiff is not prevented from trying his cause in the usual time.

The defendant may waive his special plea, and plead the general issue the same term, without leave of the court, without costs, unless the plaintiff has replied, *Barnes* 127.; and if plaintiff obtains a verdict, no costs of the

but to the merits it is.

After a judgment is set aside, the statute of limitations is not to be pleaded.

Judge's summons no stay, unless obtained prior to the time for pleading is out.

If defendant has had an order for time, may have another, if no delay.

Defendant may, before replication, waive his special plea, and plead the general issue.

the special pleas will be allowed. *Harsfall v. Greenwood. Ibid.*

How to apply
to plead
double in va-
cation.

Get a judge's summons for leave to plead several matters (naming your pleas); serve copy on plaintiff's attorney, attend thereon; and if the judge sees they are proper, he will grant an order thereon, pay 2s.; upon producing a serjeant's hand to a brief for that purpose, pay serjeant's fee 10s. 6d.; take the order to the secondaries office, and they will give you a rule; make copy for plaintiff's attorney, and either annex it to the plea, or serve it.

Of amending Declarations, and other Pleadings.

FORMERLY the suitors were much perplexed by writs of error, brought upon very slight and trivial grounds, as mis-spellings, and other mistakes of clerks, all which might be amended at the common law, whilst all the proceedings were in paper. *Vide 8 Co. 157.* For they were then considered only *in fieri*, and therefore subject to the control of the courts; but when once the record was made up, it was formerly held, That, by the common law, no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for, during the term, the record is in the breast of the court; but afterwards it admitted of no alteration. *Co. Litt. 260.* Now the courts are more liberal, and, where justice requires it,

it, will allow of amendments at any time, whilst the suit is depending, notwithstanding the record be made up, and the term past; and in this court it may be done, although the roll be carried in, provided it does not too much deface it. *Barnes 8.*

It may be amended after plea pleaded, or issue delivered, in matter of form, without costs; but in substance it cannot, or after special plea or demurrer.

After argument on demurrer, plaintiff moved to amend his declaration, which was granted; the merits of the cause not coming in question on the argument, only the form of the pleading. *Barnes 9.*

Defendant pleaded three pleas; plaintiff amended his declaration, paid the costs, gave a new rule to plead, and demanded a plea. Whereupon the former pleas were re-delivered, without a second application to counsel or the court; plaintiff signed judgment for want of new pleas, but it was set aside; for defendant is not obliged to vary his first defence. *Barnes 273. Wilcox v. Sharpe.*

Plaintiff obtained a rule to shew cause, why his declaration should not be amended, on giving an imparlance, and on shewing cause, it appearing that defendant had demurred, and given a rule to join in demurrer; the court held that the plaintiff must pay costs. *Barnes 6.*

Defendant moved to amend his avowry, by altering the sum due for rent, which was miscomputed. Plaintiff opposed it, demurrer being joined, and the cause in the paper for

When it may be amended.

After argument on demurrer, may move to amend.

After an order for amendment, on payment of costs, and pleading de novo, defendant re-delivered the former pleas, and held good.

Must pay cost after demurrer, if you wish to amend declaration.

Avowry amended after cause entered for argument on demurrer.

for argument, *per cur.* the defendant must amend on payment of costs. *Barnes 8.*

After argument on the merits, avowry refused to be amended.

After argument on demurrer, and rule for further argument, defendant moved to amend the avowry, by inserting three necessary requisites to justify his distress. But the amendment was denied; the former argument having been upon the merits, and there not being sufficient matter, set out in the avowry to amend by. *Barnes 9.*

After issue joined, defendant had leave to amend his avowry.

Defendant had avowed for a quit-rent; and issue was joined in *Easter Term*: in *Trinity* following, defendant moved for and got a rule to shew cause why he should not amend three avowries for quit-rents, payable at different times, on payment of costs; which rule (plaintiff refusing to consent that defendant might give the matter in evidence on the then issue) was made absolute, on payment of costs; defendant *rejoining gratis*, and taking short notice of trial. *Barnes 22.*

Declaration in *quare impedit* amended.

After a variance pleaded between writ and count in *quare impedit*, the court gave leave to plaintiff to amend on payment of costs. *2 Wils. 18.*

Court denied to amend the declaration and writ in *quare impedit*.

Motion to amend the original writ and declaration in *quare impedit*, and though urged, if not amended, six months being passed, a lapse would incur; the court denied it. *Barnes 3.*

Bill against an attorney amended.

Bill against an attorney, as an attorney of C. B. and by mistake it was concluded, "and therefore he brings his suit," instead of "and therefore he prays relief, &c." Upon motion in the Treasury, the judges gave leave to amend on payment of costs *nisi*, and afterwards,

afterwards, on affidavit of service, it was made absolute. *Barnes* 3.

Declarations in actions on bail-bonds may be amended as well as any other; the court perhaps may have refused, in some instances, to grant leave to amend writs of *scire facias* against bail, where, by such amendment, the bail might be deprived of the advantage of surrendering the principal, as perhaps they might do in case of the faulty *scire facias* quashed, and a new one sued out. *Barnes* 26. 114.

On a common *clausum fregit*, plaintiff declared against defendant as administrator, and he pleaded that administration was never committed to him; upon which defendant moved to amend his declaration, by making it stand against defendant as executor, and granted on payment of costs. *Barnes* 5.

The plaintiff after plea pleaded, or after the end of the second term, shall not add a new count to his declaration (as an *indubitatus assumpsit*, or the like), under pretence of amending his declaration. *Say. Rep.* 97. 151. 172.

The rule is, that plaintiff must apply for leave to add a count within two terms, because he is obliged to declare within that time, otherwise he will be out of court, and a new count is the same as a declaration. 1 *Wils.* 223.

Plaintiff moved in *C. B.* to add a new count to his declaration, which was of *Michaelmas* term preceding, on payment of costs: defendant objected, that by the course of the court, a count could not be added after the application.

Declarations on bail bond may be amended.

On a common *clausum fregit*, declaration amended.

Shall not, after the second term, add a new count under pretence of amending;

but must apply to add a new count within two terms.

Leave was given to add a new count after the second term, paying costs of plea and the application.

the second term, which was agreed to be the practice: but as plaintiff might discontinue, the court, to save the trouble of a new action, made the rule for the amendment absolute, on payment of the costs of the plea and application, defendant having leave to plead *de novo*. *Barnes* 19.

Leave given to amend the declaration by adding pledges and memorandum, making the declaration agreeable to the bill on record. *Barnes* 20.

The title of the declaration made agreeable to the fact.

The title of a declaration was amended by making it of a particular day; *viz.* the return day of the *pluries distringas*, which was sued out to compel an appearance, and to which the defendant appeared, to let in the defendant to plead a dilatory plea, *viz.* that *Wilkes* was outlawed. 2 *Wils.* 256

Will not let you amend to deface the roll.

Motion in *C. B.* to amend declaration after the plea roll filed, *per cur.* That practice is not warrantable; and the amendment being such as would greatly deface the roll, denied. *Barnes* 8.

Amendment may be applied for by summons both in term and vacation.

All clerical or other mistakes in a declaration or issue may be amended by summons before a judge; and all other proceedings, whilst on paper, may be also amended, by the established practice of this court.

Days of continuance although entered on the roll may be amended. *Barnes* 104.

On amendment, defendant is intitled to a new four-day rule.

On amendment of a declaration, defendant is intitled to a new four days rule to plead. 2 *Black. Rep.* 785.

After a new trial granted,

But after a rule granted for a new trial, there can be no amendment allowed in the record

record by striking out two pleas. The intent of new trials is to submit the same questions to the consideration of another jury. *Parker v. Ansell.* 2 Black. Rep. 920.

A *ca sa* may be amended after it has been executed, it being returnable before us at *Westminster*, and not before our justices. 2 Black. 836.; but it was amended by the award in the roll. A *ca sa* was ordered to be amended, by making the defendant's name *Edmund* instead of *Edward*, after it was executed. *Brown v. Hammond.* Barnes 10.

The court will amend the irregular teste to a writ, when not made fifteen days before the return, it being the fault of their own officer. 2 Black. Rep. 918.

Action against surveyors of *Westminster* Bridge, for taking and destroying timber. By the act plaintiff was confined to bring action within six months, and to lay it in *Middlesex*; by mistake, action was laid in *London*, and the mistake not discovered till after plea pleaded and issue joined; and if plaintiff had begun *de novo*, he would have been too late; it was therefore ordered upon payment of costs. In an action upon a penal statute, the court probably would not interpose; but in the case of a remedial law, the amendment must be made. 3 Lev. 347. Barnes 488. *Cook v. Shore*, and others. Vide Barnes 12. 19.

Mutual Debts.

- A**T common law, if the plaintiff was more indebted to the defendant than the defendant was indebted to him, yet the defendant had no method to strike a balance : he could only go into a court of equity for doing of what is most clearly just and right to be done ; and in order to prevent such expence, by *Stat. 2 Geo. 2. c. 22.* It is enacted,
- Mutual debts may be set off. “ That where there are mutual debts between the plaintiff and defendant, and if either party sue, or be sued as executor or administrator, where there are mutual debts between the testator or intestate, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case requires, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue.”
- Mutual debts may be set off by pleading in bar, &c. 8 *Geo. 2. c. 24.* enacts, “ That mutual debts may be set against each other, either by pleading in bar, or given in evidence on the general issue, in the manner as in the 2 *Geo. 2. c. 22.* mentioned, notwithstanding that such debts are deemed in law to be of a different nature, unless in case where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty ; and in all cases, where either the debt for which the action hath been, or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue by reason of any such penalty, the debt intended to be set off shall
- unless on bond, then to be pleaded !.

“ shall be pleaded in bar ; in which plea shall be
 “ shewn how much is truly and justly due on either
 “ side ; and in case the plaintiff shall recover in any
 “ such action or suit, judgment shall be entred for
 “ no more than shall appear to be truly and justly
 “ due to the plaintiff, after one debt being set
 “ against the other as aforesaid.” Made perpetual,
 14 Geo. 2. c. 34. 21 Geo. 2. c. 33. 24 Geo. 2.
 c. 28.

By 5 Geo. 2. c. 30. “ Where it shall appear to the commissioners, that there has been mutual credit given to the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners, or the assignees of the bankrupt’s estate, shall state the account between them, and one debt may be set against another, and what shall appear to be due on the balance, and no more shall be claimed or paid on either side.”

In replevin, the avowant justified under a distress for rent, the plaintiff at *nisi prius* insisted, that there was more due to him than the rent amounted to, and *Dennison J.* refused the evidence. Upon a motion for a new trial, the court held, that 2 Geo. 2. did not extend to the case of a distress ; for that is not in action, but a remedy without suit : they likewise declared, that it did not extend to detinue, and the like actions of wrong. *Bull.* 177.

Where the debt is of an equal sum, there the action is barred ; but if it be for a less sum than for what the action is brought, the defendant must pray to have it set off. *Bull.* 175.

And where a debt is of equal sum with the plaintiff’s demand, it is to be pleaded in bar

If defendant's demand exceeds plaintiff's, must give it in evidence upon the general issue, and give notice.

If defendant's demand does not countervail plaintiff's, must move to pay money into court.

May have leave to withdraw the general issue, and pay money into court.

Defendant pleaded the general issue, but forgot to give notice at the same time of a set-off, and upon motion in time the court gave leave to withdraw the plea, in order to deliver it again with a notice of set-off. *Say. Rep.* 316.

The notice of set-off should contain *certainty*; for the Legislature designed them to be in the nature of cross actions, and therefore they should have that certainty, so that the plaintiff may be able to make a proper defence.

A notice of set-off reducing plaintiff's demand, does not affect the jurisdiction.

A set-off reducing the plaintiff's demand under 40s. does not affect the jurisdiction of the superior courts, 3 *Wils.* 48.; so that if plaintiff recover 1s. damages, he must have his costs.

In what actions there may be a set-off.

Debt upon a simple contract may be set off against a specialty debt, *Bull.* 176. A simple contract, against debt upon an annuity bond, 2 *Barn.* 820. Mutual debts between the testator and executor, without suit, *Bull.* 75. Simple contract, against debt upon a lease, for non-payment of rent, *Ibid.* 177. And actions where the demands are of the same nature may be set off, and a judgment in

in *K. B.* may be set off against a judgment in the *C. B.* 3 *Wils.* 396. But notice of set-off need not be given by defendant in an action for money had and received to plaintiff's use, where defendant had paid plaintiff his whole demand (except what he retained for his labour and service). 4 *Burr.* 2134.

But debt due to a man in right of his wife, in an action against him, on his own bond, cannot be set off. *Bull.* 175. Nor can a penalty upon articles of agreement, though forfeited. *Ibid.* 175. Nor simple contract for cloaths to a bail bond. *Ibid.* Nor can there be a set-off in replevin, though the distress was taken for rent. *Ibid.* 177. Nor can a bond be set off at the suit of assignees of a bankrupt, to an action by them, for goods sold and delivered. 1 *Wils.* 155. A debt barred by statute of limitations, cannot be set off; if pleaded in bar, the plaintiff may reply the statute of limitations. If it is given in evidence, on a notice of set-off, plaintiff may object to it at the trial. *Bull.* 176. *Str.* 1271.

In what a set-off cannot be pleaded, or notice given.

A debt barred by statute of limitations cannot be set off.

Of Paying Money into Court.

THIS practice was introduced for the sake of giving a party (who never had it in his power to make a tender, or neglected to make one) an opportunity of satisfying the debt for which the action had been commenced, and likewise to deliver him from the necessity of proving the tender, if he had made one.

In what actions money may be paid into court.

Money may be paid into court in all actions where the sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury: it is right and reasonable to admit the defendant to pay the money into court, and have so much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept it, he shall proceed at his peril.

In actions on the case upon *indebitatus assumpsit*, where there is a *quantum meruit*, *Str.* 579.; debt for rent, covenant for non-payment of rent, *Barnes* 198.; and not repairing, *Salk.* 596.; covenant in a sum certain, as 11*l.* for not dressing corn, 2 *Barnes* 229.; 5*l.* for advanced rent for ploughing meadow ground, 2 *Black. Rep.* 837.; replevin, where defendant avows for rent in arrear, *Salk.* 596.; *ejectment* for rent, *Str.* 576. *Stat.* 4 *Geo.* 2. c. 28.; non-payment of mortgage-money, *Str.* 413.; upon a charter-party of *affreightment*, where the breaches are only for freight and demurrage, 2 *Burr.* 1120.; *trover* for goods not being ponderous, the plaintiff has been ordered to shew cause why he should not accept them, *Barnes* 200.; *trover* for money, 1 *Str.* 142.; *trover* for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above its real value, but that its real and ascertained value must be the sole measure of the damages, 3 *Burr.* 1344.; debt for 5*l.* for killing a hare, *Str.* 1217.; for penalties on the game laws, being an action popular,

popular, 2 *Black.* 1052.; upon a *policy of assurance*, *Stat. 19 Geo. 2. c. 37. s. 7.*; may be brought into court upon the common rule of course; but in *covenant* upon a *charter-party* and *trover*, and debt for a penalty, the court must be specially moved upon an affidavit of the facts; but the court will not give the defendant liberty to bring money into court on some of the counts, and demur to the rest, *Pract. Reg. C. P.* 256.; for the reason of making the rule for bringing money into court, is to prevent vexation, and make an end of the cause.

Formerly the defendant, in an action of debt upon bond, who had obtained the common rule, must have brought the whole penalty into court; but now this hardship is remedied by *Stat. 4 Ann. c. 16. s. 13.* whereby it is enacted, "That if pending an action, upon a bond with condition, to be void upon payment of a less sum, the defendant shall bring into court all the principal money, and interest due, and costs; the said money shall be taken to be a full satisfaction of the said bond, and shall discharge defendant."

Bond given for money payable by installments, action is brought for the penalty on non payment of one of them, the court will give leave to pay the money in arrear, and costs, but the plaintiff must sign judgment with a stay of execution, until there be a failure in some future payment.

Money due by first installment may be brought in, but not to stay the plaintiff from signing his judgment.

Action was brought on a bond to secure an annuity by installments, a rule was made absolute to stay the proceedings, on payment of 3*l.* (the only installment due and costs) made absolute. *Barnes* 288.

Of Paying Money into Court.

Leave was given to bring 5*l.* 5*s.* into court on a common rule, with respect to the seventh and eighth counts, there being nine in the declaration; and as to the rest, to plead the general issue, the statute of limitations and set-off. *Barnes* 286.

Like leave was granted on the common rule, and to plead *plene administravit*, and the general issue to the whole. *Ibid.* 287.

On bond to pay interest half-yearly, and the principal in three years; leave to pay interest and costs granted.

Debt on bond conditioned to pay 600*l.* and interest, in three years from the date of the bond, by installments of 15*l.* half yearly, and 515*l.* at the end of the term, which is not yet arrived. On failure of payment of interest, obligee brought his action; and it was now moved to stay proceedings on payment of the interest due: but the court ordered judgment to be entered for the whole, with stay of execution, on payment of the interest due. *Marsen against Touchett.* 2 *Black. Rep.* 706.

Proceedings on bond for payment of money by installments, and on default to stand in force for the whole sum, shall not be staid upon payment of the installments in arrears.

Bond was given to pay 496*l.* by installments; and if default made in payment of any one installment or more, then to be in force for the whole, then remaining due and unpaid. On default bond was put in suit; and after verdict it was moved to stay proceedings on payment of the installments due, with costs, and *per cur.* Under this special condition, the defendant is not intitled to this indulgence under either of the acts of 4 & 5 *Ann.* or 8 & 9 *W. 3. c. 11.* This is not to relieve against a forfeiture; for the plaintiff, at his peril, must enter up his judgment for no more than the residue of the principal and interest, *bona fide* due and unpaid. The plaintiff had a

to

to the defendant, and to forbear prosecuting his just demand, provided the defendant would punctually discharge it by installments. By neglecting to do, he has lost the benefit of this condition, and remains in the case of other debtors upon bond. Discharge the rule. *Ibid.* 959.

After plea of general issue, leave was given to withdraw it, and bring into court 42s. and plead same again on terms. *Barnes* 269.

Leave to plead bankruptcy to the first count, and to bring money into court on the common rule, and plead the general issue on the other, was given. *Barnes* 350.

If one defendant suffers judgment to go by default, and the second is outlawed, the third shall not bring money into court. 2 *Black. Rep.* 1029.

Judgment was arrested, and consequently no costs on either side; but the court ordered the money brought in to be paid to the plaintiff. *Barnes* 284.

Upon arrest of judgment, plaintiff ordered to take the money out of court.

Actions on the case for immoderately driving a hired chaise, and for consequential damages, Str. 87.; *trespass for the mesne profits in ejection, 2 Wils.* 115.; *for dilapidations, Str.* 906. *debt upon a bond to a sheriff conditioned for the good behaviour of his bailiff; and inter alia, for paying money collected for the sheriff's case; upon a bond for the performance of a collateral agreement; upon a counter bond; trespass for taking goods; replevin, where it is not for rent, money cannot be brought into court.*

In what actions money cannot be paid into court.

Defendant had brought money into court Money plaintiff would not accept same, but proceed- brought into court, plain-

If plaintiff would not accept, and was nonsuited, defendant could not have it returned. But on a new action being brought, the court made a rule that he might have that money; if not, that it should remain to the new action.

ed to trial, and was nonsuited; upon which defendant moved in the treasury, that in regard as the plaintiff was out of court, he might have the money back; but denied. Afterwards plaintiff brought a new action, and the court made a rule, *That the plaintiff might have the money brought in if he thought fit; but if not, that the money brought in should remain for the new action.* Pract. Reg. 2, 0. Rep. & Cas. C. P. 36.

The like resolution in a similar case as above, and gave leave for the defendant to bring money in, to the new action. Pract. Reg. 252.

In action on a judgment obtained in an action in a former judgment, execution staid after the third judgment, on the defendant paying into court the debt and costs recovered on the second.

The original defendant obtained judgment of non-pross, and then brought debt on that judgment for the costs, in which he had judgment by default; and afterwards brought another action of debt on the last judgment, and signed judgment: Which last judgment the original plaintiff moved to set aside, on bringing into court the debt and costs of the second judgment. On shewing cause, the court thought that he himself had given the first provocation, and had been guilty of the first laches, and discharged rule without costs, directing execution to stay, as the money on the former judgment was paid into court, in order to discountenance such oppressive proceedings. 2 Black. Rep. 785. *Simpson v. Stone.*

Money paid into court. Plaintiff proceeded and recovered a less sum, whereupon defendant moved in the treasury, that he might have the money out of court, towards his costs, and granted. Barnes 280.

have the money out of court towards his costs.

Thirty-seven pounds was paid into court, After pay-
 plaintiff recovered a greater sum, and then ment of mo-
 became bankrupt; the assignees moved to ney into
 have the 37*l.* paid to them; but plaintiff's court, plain-
 attorney insisting, that as he had been the tiff recovered
 means of obtaining the verdict, he ought first more, and be-
 to be paid his bill. Whereupon the court came bank-
 ordered his bill to be taxed, Ward to be rupt; the as-
 allowed 7*l.* 4*s.* received by him of plaintiff signees moved
 in part, and then to be paid out of the mo- to have the
 ney in court, and the residue to be paid money paid
 to the assignees. *Oujten v. Obryan. Barnes*
 145.

How to pay money into court. In actions If the sum
 where there can be no doubt but that does not a-
 you may pay money into court, viz. (such mount to
 as have been stated) if the sum paid in does more than
 not amount to more than 5*l.* then apply to 5*l.*
 the secondary for a treasury rule for that pur-
 pose, pay him 6*s.*; take the rule to the
 prothonotaries office, and the clerk will re-
 ceive the money, and put a receipt in the
 margin, pay him 1*d.* in the pound, 1*s.* 4*d.*
 for receipt, and for entering plea 2*s.* more;
 serve copy of the rule on plaintiff's at-
 torney.

If it is more than 5*l.* then a serjeant's If more, then
 hand to a brief is requisite, and (if you plead how to pro-
 the general issue) he signs it of course; ceed.
 take it to the secondaries as before, draw up
 rule, pay 6*s.* pay the money to the protho-
 notaries clerk, and for every pound 1*d.* and
 1*s.* 4*d.* for receipt; entering plea 2*s.*; serve
 copy of rule on plaintiff's attorney.

Of Paying Money into Court.

If the money
is accepted
out of court,
then how to
proceed for
the costs.

If the plaintiff accepts the money out of court, and is content, he is then to apply to the secondary, and take an office copy of the rule, pay 2*s.* 6*d.* and get an appointment from one of the prothonotaries to tax the costs; serve copy of rule and appointment on defendant's attorney, when the costs are taxed, if the same are not paid (no demand is necessary), the plaintiff's attorney may make up the issue, and proceed to trial, and take a verdict for 1*s.* though the real demand is not so much as paid into court. *Sir.* 1220.

Plaintiff's at-
torney, tho'
not satisfied
with the sum
brought in,
may take it
out, and pro-
ceed on.

If the plaintiff be not satisfied with the sum paid into court, he may apply to the prothonotaries, and on producing an office copy of the rule, they will pay the money, on deducting the poundage and receipt, and then he may deliver the issue, with notice of trial; but if, on the trial, he does not recover a greater sum of money than what was paid into court, he will be nonsuited, and must pay costs to the defendant.

If defendant
pleads any
other plea be-
sides the ge-
neral issue,
and pay mo-
ney into
court, he must
move.

If the defendant means to plead more pleas than the general issue, and also pay money into court, he must then give brief to a serjeant, with 10*s.* 6*d.* to move to plead double, and also a brief to move to pay the money into court, fee 10*s.* 6*d.* each, to the serjeant; draw up rules with the secondaries, and pay into court the money, as in p. 311.; and serve copies of the rules on plaintiff's attorney; and deliver plea at same time, or file it.

Of Paying Money into Court.

34

In the Common Pleas.

*Michaelmas Term, in the 23d Year
of King George the Third.*

Alexander Denn against Richard Fenn, Mon- Rule to pay
day the 10th of Novembr. It is ordered, money into
That the defendant shall pay to the plain- court.
tiff, or to his attorney, 10*l.* together with
his costs, to be taxed by one of the protho-
notaries of this court, if the plaintiff will
accept thereof, in full discharge of this suit;
and that thereupon all proceedings in this
action shall be staid: but if the plaintiff will
not accept thereof in full discharge of this
suit, that then the defendant shall imme-
diately bring the said 10*l.* into this court;
and the said 10*l.* shall be considered as
struck out of the declaration, and be paid
out of court to the plaintiff or his attorney;
and upon the trial of the issue, the plaintiff
shall be permitted to take a verdict for so
much only as he shall prove beyond the said
10*l.*

On the motion of Ser-
jeant Walker, for the } By the Court.
defendant.

Entered.

Gerrard.

N. B. The defendant must take care to produce
this rule at the trial.

If the plaintiff delivers the issue after he Altho' issue
has taken the money out of court, and be delivered
gives notice of trial, yet he may, on mo- on money
tion, be admitted to tax his costs up to paid in, yet
the of costs, on payment

plaintiff may proceed on the rule for costs.

Payment of money into court is an acknowledgment of the action.

the time that the money was paid into court, upon payment to the defendant of his subsequent costs. *Barnes* 282. *Davies v. Mansell*.

The payment of money into court is an acknowledgment of being liable to the action. 4 *Burr.* 2640.

Tender.

Tender.

TENDER comes from the French *tendre*, in Latin *offerre*, and in a legal sense denotes as much as carefully to offer, or circumspectly to endeavour the performance of any thing belonging to us; as to tender rent is to offer it at the time and place where and when it ought to be paid; and it is an act done to save the penalty of a bond, and of money for rent, or contract, before distress or action brought. It may be made in purses, or bags, without shewing, or telling the same, for it is the receiver's business to put it out, and tell it, *Co. Lit.* 208. a.; and it must be by offering the bags to the plaintiff, and not holding them under his arm. *Noy.* 74. And every tender at the common law, or which is given by statute, must be made before the writ sued out. *Brown's Tend.* 9. See 21 *Jac.* 1. c. 16. s. 5.

In pleading a tender in debt, defendant prays judgment de damnus, in case de ulioribus damnis.

There is a difference in pleading a tender in an action of debt, and in an action on the case; in debt, the damages are but necessary, so that in pleading a tender to such action, "the defendant must pray judgment of the damage;" but in *assumpsit*, the da-

images are principal, and he is to plead, "always ready," with a *profert hic in curia*, and "pray judgment *de ulterioribus damnis*." Salk. 622. 3 Salk. 344.

If a tender at the day, of corn, or of any other goods of a perishable kind be pleaded, with a refusal, there is no need to plead "uncore prist, still is ready." 9 Rep. 70. 1 Inst. 207.

Wherever the debt or duty arises at the time of the contract, and is not discharged by a tender and refusal, it is not enough for the party who pleads the tender, to plead a tender and refusal, and *uncore prist*; but he must also plead "*touts temps prist*," "that he has always been ready." Salk. 622. 12 Mod. 152. Carth. 413.

Every requisite which is in a particular case necessary to the validity of a tender, must, in pleading such tender, be shewn to have been complied with, else the plea is not good. Salk. 624.

Tender of stock must be at the last part of the day it can be accepted, Str. 777.; and the usual hours must be set forth. Ibid. 832.

A plea of tender ought strictly to be pleaded in the same manner as a plea in abatement, viz. in four days after declaration delivered, if delivered four days before the end of the term; and if delivered before the effoign day of a term, then it ought to be pleaded within four days of the next term, as a plea of last term, or you must have a treasury rule for that purpose. Carth. 413. 2 Barnes 284. 361. But if the defendant lives at a great distance in the country, so that his attorney cannot

cannot deliver the plea in due time, the court will give time to plead a tender, *as of the term in which the declaration was delivered*; but such application should be within the four days, or at least as soon as it possibly can, without any delay on the part of the defendant. *Barnes* 361. This being a fair, honest plea, there can be no doubt but that it may be pleaded after a judge's order; and it has been granted by Mr. J. Gould, altho' not as yet solemnly determined by the court.

After demurrer and amendment made of the declaration may plead a tender.

After demurrer to a declaration, and amendment made, the court gave leave to defendant to plead a tender. *Barnes* 359.

Will not permit the plea to be withdrawn, and plead non assumpsit.

After plea of tender, and money brought into court, the court will not admit defendant to withdraw his plea, and plead the general issue. *Barnes* 235.

Money tendered must be paid into court; and how done before plea.

The defendant's attorney must pay the money tendered into the hands of the prothonotaries, who will give a receipt for the same in the margin of the draft of plea; pay him 8 d. *per* sheet, receipt 1 s. 4 d. and no rule is drawn up to pay the money into court.

Motion must be made to plead non assumpsit to all, and a tender.

If you plead *non assumpsit* to the whole of the declaration (excepting no part), and a tender also, then the court must be moved to plead double; but if *non assumpsit* is pleaded to part, with a tender as to the residue, then the plea may be delivered or filed without motion; but it must be signed by a serjeant, *see* 10 s. 6 d. *Vide* p. 319.

A right

A right to damages, on account of non-payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refusal, be revived again by a demand, subsequent to the tender and refusal; a new cause of action arises from the non-payment or the non-performance thereof, upon such demand, 5 *Bac. Abr.* 12. *Brownl.* 71.; and therefore the plaintiff may reply such subsequent demand, and refusal by the defendant, which, if proved, plaintiff must have a verdict.

If the plaintiff take issue on the tender only, he must not take the money out of court, for by taking it he admits the same to be right; and judgment is given for the defendant to go quit as to that plea; but if he take the money out, and means to proceed for further damages, he may enter an acquittal as to the tender, and proceed on the general issue for the residue.

If plaintiff take issue on the tender, he must not take money out of court; but if he may proceed on general issue for further damages.

“Tender of amends may be made by justices of the peace, within a month after notice given of an action intended to be brought against them for any thing done by them in the execution of their office, and they may plead the same with Not Guilty, and any other plea, with leave of the court; and in case they shall neglect to make such tender, they may, before issue joined, pay money into court,” 24 *Geo. 2. c. 44. s. 24.* Before a justice is allowed to pay money into court, on an action of false imprisonment, it must appear that he is sued as a justice, for some misbehaviour in his office. 2 *Black. Rep.* 859.

Tender by justices.

Trespals.

The defendant may, to a trespass *quare clausum fregit*, plead a *disclaimer*, and that the trespass was by negligence, or involuntary, and tender of sufficient amends before action brought; whereupon, or on some of them, the plaintiff shall be enforced to join issue. *Stat. 21. Jac. 1. c. 16.*

Under distress
for rent.

Tender may be made before action, for any unlawful act done by a person who has distrained for rent justly due, *11 Geo. 2. c. 19. s. 20.*; likewise in distraining for money justly due for the relief of the poor. *17 Geo. 2. c. 38. s. 10.*

Any money
coined at the
Mint good.

A tender in any money coined at the *Mint*, upon which there is the king's stamp, is good; for all such money is good in proportion to its value, without a proclamation. *Salk. 446. Comb. 387.*

To an avowry
for damage
feasant when
tender to be
made.

To an avowry for damage feasant in replevin, tender must be pleaded to have been made before impounding; for it is not within the *statute of Jac. 1.* which goes only to trespass, where tender of amends may be pleaded to have been made at any time before action brought. *Lutw. 1596.*

In a plea in
bar of tender
of rent in re-
plevin, the
money ought
not to be
brought into
court.

To an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into court, because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Bull. 60. Salk. 584.*

But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs, in bar of an avowry for rent in any case, unless the distress was made of corn, grals, &c. growing on the premises: and then

then such plea is given by 11 Geo. 2. c. 19.

f. 9.

A tender of a bank note as money, is not ^{Bank note no} strictly speaking a good tender; but if the ^{good tender.} tenderer offer to get money for the note, this makes it a good tender. *Lq. Cas. Abr.*

319. *Same doctrine by Lord Mansfield at Guildhall. Hil. 16. Geo. 3.*

On a plea of tender, if the money be not ^{If the money} paid into court, the plaintiff may sign judgment. ^{he not paid} ^{into court.}

Serjeant *Barland* moved to plead several ^{Defendant} pleas to a declaration in case, upon promises; viz. *non assumpsit* to all the counts, ^{cannot plead} ^{non assumpsit} and a tender, which was opposed by Serjeant *Leigh*, who insisted that the course and ^{to all the} ^{courts, and a} practice of pleading a *tender*, is, to plead it ^{tender as to} ^{part.} *to part*, and *non assumpsit* as to *all the rest*; and of that opinion was the court, and refused to give leave to plead *non assumpsit* to the whole declaration, and a *tender* as to part, *Dowgal v. Brownson. 3 Wils. 145.*: But he may plead *non assumpsit* as to all the promises, except as to a certain sum, parcel of the several sums mentioned in the declaration, and as to that sum, a *tender*, 2 *Black. Rep. 723.* notwithstanding the case in 2 *Burnes 293.*

at

AS pleas in abatement enter not into the ^{Restrictions.} merits of the cause, but are dilatory, the law has laid the following restrictions on them: First, By the statute 4 Ann c. 16.
“ No

"No dilatory plea is to be received unless on oath, and probative cause shewn to the court."

2. No plea in abatement shall be received after a respondeas ouster; for then they would be pleaded in infinitum. 2 Saund. 41. 3dly, That they are to be pleaded before imparlance, except where the declaration is delivered too late, so as the rule cannot be given, or where the defendant is intitled to one. 4thly, That when issue is joined on them, they shall be peremptory, 2 Show. 42. 6 Mod. 236.; and the judgment shall be *quod recuperet*, because the defendant chusing to put the whole weight of his cause upon this issue, when he might have had a plea in chief, is an admittance that he had no other defence. 10 Mod. 112. Sir 532.

On a plea in abatement no advantage can be taken of the declaration; for nothing but the writ is then in question, for nothing else is pleaded to, *Carth* 172. 3 *Lev*. 37; nor in such pleas which relate to the person there is no necessity of laying a venue, for all such pleas are to be tried where the action is laid. *Salk*. 4. pl. 14. *Carth*. 363. 12. *Mod*. 125.

Cannot be
pleaded be-
fore defend-
ant appears.

A plea in abatement cannot be pleaded before the defendant is in court, because he does not answer to the process of the court, which formerly was returned and read at the bar. If he appeared, the *Countor* read the writ to the court in his presence, and he was to plead thereto in four days, unless special leave was given by the court; because the person coming in by the process of the court ought not to have time to delay the plaintiff. *Gilb. H. C. P.* 52.

And

And the said *Mary* in her own proper person comes and prays judgment of the original writ of the said *John*, because she says, that she now is, and before the issuing forth of the said original writ of the said *John*, was and ever since hath been, covert and married to one *William Morris* then and still her husband, to wit, at *London* aforesaid, in the parish and ward aforesaid, and this the said *Mary* is ready to verify; wherefore because the said *William Morris* is not named in the said writ, the said *Mary* prays judgment of the writ aforesaid, and that the same may be quashed, &c.

Coverture
pleaded in
abatement.

Nash Grose.

And *John Stout*, against whom the original writ hath been issued, by the name of *Thomas Stout*, in his proper person comes and pleads, that he was baptized by the name of *John*, to wit, at *Westminster* aforesaid, and by the name of *John*, hath always hitherto since his baptism been called and known; without this, that the said *John* now is, or at the time of suing forth of the said original writ of the said *James* was, or ever before had been, or ever since hath been called by the christian name of *Thomas*, as by the said writ is above supposed; and this he the said *John* is ready to verify; wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

Misnomer
pleaded in
the Christian
name.

Thomas Walker.

The defendant is to deliver his plea in writing on paper (stamped with a treble
Y penny

Abatement.

penny stamp) to the plaintiff's attorney, *Mich.* 1654.; and if there be no such attorney to be found, or being found refuseth to accept it, then the plea may be left in the office. *Ibid.* *N. B.* But now the practice is either way.

In the Common Pleas.

James Letch, Plaintiff,
and
John Stout, sued by the name of
Thomas Stout, Defendant.

Affidavit. *John Stout*, of *Essex* mealman, the defendant in this cause, maketh oath and faith, That the plea hereto annexed is true in substance, and matter of fact.
Sworn, &c. *John Stout.*

To be sworn before a judge, and ingrossed on a treble six-penny stamp paper, and annexed to the pi

Replication to a plea of misnomer in the surname, that defendant is known as well by one name as another.

And the said *James* says, That notwithstanding any thing by the said *John* above in pleading *John*, the said writ ought not to be quashed, because he says, that the said *John*, at the time of suing forth of the said writ of the said *James*, and before, was called and known as well by the name of *Hody* as by the name of *Oddy*, as by the said writ is above supposed; and this he prays may be inquired of by the country, &c.

T. Walker.

And

And the said *John* in his own person comes and defends the wrong and injury, when, *Ec.* and prays judgment of the writ aforesaid, because he says, That the aforesaid supposed promises and undertakings in the said declaration mentioned, if any were made, were and each of them was made by the said *John Mead* and *John Wilson*, *Charles Roberts* and *Michael Tew*, jointly, and not by the said *John Mead* only, which said *John Wilson*, *Charles Roberts*, and *Michael Tew* are still alive; to wit, the said *John Wilson*, in the island of the said *Charles Roberts*, late at *Liverpool*, in the county of *Lancaster*, but now on a voyage at sea, and the said *Michael Tew*, in *Liverpool* aforesaid; and this the said *John Mead* is ready to verify; wherefore, because the said *John Wilson*, *Charles Roberts*, and *Michael Tew* are not named in the said writ, the said *John Mead* prays judgment of the said writ, and that the same may be quashed, *Ec.*

T. Walker.

How to enter a *caſſetur breve* in case the plea filed be true.—Get a roll from the prothonotaries of the term declaration is of, and enter the whole declaration and plea thereon, and at the foot of the plea enter the *caſſetur breve* thus:

And thereupon the said *T. W.* says, That he cannot ~~say~~ the said exceptions of the said *J. R.* above by his plea taken to his said writ, but admits the same to be true; therefore it is considered by the court here, that the said writ of the said *T. W.* be quashed, *Ec.*

Take the same to the prothonotaries office and docket it, pay for the entries 8*d.* per sheet, then sue out a new writ.

General Issues.

General Issues.

THE general issue, or general plea is, what traverses, thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it; as in trespass either *vi et armis*, or on the case *non culpabilis*, not guilty; in debt upon contract, *nisi acet*, he owes nothing; in debt on bond, *non est factum*, it is not his deed, or on an assumpsit, *non assumpsit*, he made no such promise. Or in a real action, *nul tort*, no wrong done; *nul disseisin*, no disseisin; and in a writ of right the nule or issue is, that the tenant has more right to hold, than the demandant has to demand. These pleas are called the general issue, because by importing an absolute and general denial of what is alledged in the declaration, they amount at once to an issue, by which it is meant a fact affirmed on one side, and denied on the other.

No general issue need be signed by a serjeant, but it is to be ingrossed and delivered on a treble penny stampt paper, or filed with the prothonotary, pay 2*s.*

N. n. assumpsit.

And the said *John*, by R. C. his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not undertake and promise, in manner and form as the said *A. B.* hath above thereof complained against

against him, and of this he puts himself upon the country, &c.

And the said *John*, by *R. C.* his attorney, *Non est factum* comes and defends the wrong and injury, *tum*. when, &c. and says, that he ought not to be charged with the said debt, by virtue of the said writing obligatory, because he saith, that the said writing obligatory is not his deed; and of this he puts himself upon the country, &c.

And says, that he ought not to be charged with the payment of the said debt, by virtue of the said indenture, because he saith, that the said indenture is not his deed; and of this he puts himself upon the country, &c. *Non est factum to an action on an indenture.*

And says, that he does not owe to the said plaintiff the said 100*l.* or any part thereof, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Nil debet.*

That he doth not owe to our said lord the king, and to the said *Richard*, who first as afore said, the said 100*l.* or any part thereof, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Nil debet to the king, as a qui tam action.*

That the said *A. B.* in his life-time did not undertake and promise in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Non assumpsit by an executor.*

That he doth not detain from the said *Richard* the said indenture of lease, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. *Plea to an action in detinue.*

ner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Not guilty in trespass.

That he is not guilty of the trespass afore-said above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Not guilty in trespass and assault.

That he is not guilty of the trespass and assault, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Not guilty in case.

That he is not guilty of the premises above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Non assumpsit and a few B.

And the said *John*, by J. S. his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not promise and undertake, in manner and form as the said *Benjamin* hath above thereof complained against him; and of this he puts himself upon the country, &c.

In the Common Pleas.

Benjamin Philpot, Plaintiff,

Between and

John Shears, Defendant.

Notice of set-off for work and labour, with hoes, &c.

Take notice that the above defendant will at the trial of this cause give in evidence, and insist, that the plaintiff before, and at the time of the commencement of this suit, was, and still is indebted unto the said defendant

defendant in the sum of 200*l.* for the use and hire of divers horses, mares and geldings, by him the said defendant let to hire to the said plaintiff, and at his request, and for the carriage of divers goods, wares, and merchandizes of the said plaintiff, at his like request, in divers waggons, carts, and other carriages of the said defendant, and at his like request; and for the work and labour of the said defendant by him and his servants, with his carts, waggons, and other carriages done and performed for the said plaintiff, and at his like request; and also for the work and labour, care and diligence of the said defendant, by him before then done and performed for the said plaintiff, and at his like request; and also for money paid, laid out, and expended by the defendant for the said plaintiff, and at his like request; and for money by the said defendant before then lent and advanced to the said plaintiff, and at his like request; and for money by the said plaintiff had and received to and for the use of the said defendant, and for divers goods, wares, and merchandizes by the said defendant before that time sold and delivered to the said plaintiff, and at his request; and for money due and owing from the said plaintiff to the said defendant upon an account stated between them; which said sum of 200*l.* is still due and owing from the said plaintiff to the said defendant, and out of which sum, he the said defendant will at the trial of this cause, set off and allow the said plaintiff, so much against any demands to the said plaintiff, to be proved at the said trial, as will be sufficient to satisfy such demand,

General Issues.

pursuant to the statute in such case made and provided. Dated the 11th day of *November*, 1783. Yours, &c.

To Mr. *A. B.* Plaintiff's Attorney. *J. S.* Defendant's Attorney.

In the Common Pleas.

Edward Wills, Plaintiff,
Between and
Leonard Hill, Defendant.

Notice of set-off on a judgment in the K. B.

N. B. Put the *non* suit.

Take notice, That the above defendant will, at the trial of this cause, give in evidence and insist, that he the said defendant heretofore, to wit, in this present *Trinity* term, in the twenty-third year of the reign of our Lord the now King, in the court of our said Lord the King, before the King himself (the said court then and still being holden at *Westminster*, in the county of *Middlesex*) by bill, without the writ of our said Lord the King, and by the consideration and judgment of the same court, recovered against the above-named plaintiff 41*l.* 10*s.* which, in and by the said court, were then and there adjudged to the said defendant, for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings then lately made by the said plaintiff to the said defendant, and whereof he the said plaintiff was convicted, as for his costs and charges by him about his suit in that behalf expended, as by the record and proceedings thereof, remaining in the said court of our said Lord the King, before the King himself, to wit, at *Westminster* aforesaid, more fully appears;

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pears; which said judgment is still in full force and effect, not reversed, satisfied, or otherwise vacated; and that under and by virtue of the said judgment, he the said plaintiff, before and at the time of the commencement of this suit, was, and still is, indebted to the said defendant in a large sum of money, to wit, in the sum of 41 l. 10s. recovered thereby; and out of which said sum of money, he the said defendant will, at the said trial, set off and allow to the said plaintiff, so much thereof against any demand of him the said plaintiff, to be proved at the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided. Dated, &c.

Special Pleas.

AND the said *John*, by *J. B.* his attorney, comes and defends the wrong and injury, when &c. and says, That he did not undertake and promise, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. And for further plea in this behalf, the said *John*, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *Richard* ought not to have or maintain his aforesaid action thereof against him the said *John*, because he saith, that he did not undertake or promise, at any time within six years next before the

Non assump-
sit, infra sex
annos.

Y 5 day

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day of suing forth of the original writ of the said *Richard*, in manner and form as the said *Richard* hath above thereof complained against him the said *John*; and this the said *John* is ready to verify: Wherefore he prays judgment, if the said *Richard* ought to have or maintain his aforesaid action thereof against him, &c. *Nash Grose.*

Replication.

And the said *Richard*, as to the said plea of the said *John*, by him secondly above pleaded in bar, says, that he ought not to be barred from having or maintaining his aforesaid action thereof against him, because he says, that the said *John* did, within six years next before the day of suing forth the said original writ of him the said *Richard*, to wit, on the day of in the year of our Lord 1783, at *Westminster* aforesaid, undertake and promise, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country. And the said *John* doth the like, &c. Therefore, as well to try this issue, as the said other issue above joined, the sheriff is commanded, that he cause to come here, on the morrow of *All Souls*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. *J. C. B.*

B. Add
be similiter
to the non as-
umpsit.

of set-off
money
is paid,
out, and
and re-
ved.

And the said *John*, by *R. P.* his attorney, comes and defends the wrong and injury, when, &c. and says, that the said *Richard* ought not to have his aforesaid action thereof maintained against him, because he says, that the said *Richard*, at the time of the suing forth of the original writ of the said *Richard* against the said *John*, and before,

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that is to say, on the 1st day of *June*, in the year of our Lord 1782, at *Windsor* aforesaid, in the county of *Middlesex*, was and still is indebted to the said *John* in more money than the money due and owing from the said *John* to the said *Richard*, upon or by virtue of the several promises and undertakings in the said declaration mentioned, (that is to say), in the sum of 100*l.* of lawful money of *Great Britain*, for so much money of the said *John*, by the said *John* to the said *Richard*, and at his special instance and request, before that time lent and advanced; and in the further sum of 10*l.* of like lawful money, for so much money before that time paid, laid out, and expended by the said *John*, to and for the use of the said *Richard*, and at his special instance and request; and in the further sum of 100*l.* of like lawful money, for money by the said *Richard* before that time had and received, to and for the use of the said *John*. And the said *John* further says, that the said several sums of money so due and owing from the said *Richard* to the said *John*, as aforesaid, exceed the damages sustained by the said *Richard*, by reason of the not performing the said several promises and undertakings of the said *John*, in the said declaration mentioned; and that out of such several sums of money, he the said *John* is willing, and hereby offers to set off and allow to the said *Richard*, so much money as the damages sustained by the said *Richard*, by reason of the not performing of the said several promises and undertakings of him the said *John*, mentioned in the said declaration of the said *Richard*, amount un-

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to ; and this the said *John* is ready to verify. Wherefore he prays judgment, if the said *Richard* ought to have his aforesaid action thereof maintained against him, &c.

Nash Grose.

Replication.

And the said *Richard* says, That he, by reason of any thing by the said *John* above in pleading alledged, ought not to be barred from having and maintaining his aforesaid action thereof against the said *John*, because he says, that he the said *Richard* was nor, nor is indebted to the said *John* in manner and form as the said *John* hath in his aforesaid plea above alledged ; and the said *Richard* prays, that this may be inquired of by the country ; and the said *John* doth the like, &c. Therefore the sheriff is commanded, that he cause to come here, on the morrow of *All Souls*, twelve, &c. by whom, &c. and who neither, &c. because as well, &c. *T. W.*

Satisfaction pleaded in discharge of the promises.

And the said *John*, by *S. U.* his attorney, comes and defends the wrong and injury, when, &c. and says, That the said *Richard* ought not to have or maintain his aforesaid action thereof against him, because he says, that after the making of the several promises and undertakings in the said declaration mentioned, to wit, on the first day of *May*, in the year of our Lord 1783, at *London* aforesaid, in the parish and ward aforesaid, the said *John* then and there delivered to the said *Richard* one hoghead of sugar, in full satisfaction, and discharge of the said several promises and undertakings in the said declaration mentioned, and which said hoghead
of

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of sugar the said *Richard* then and there accepted and received, in full satisfaction and discharge of the said several promises in the said declaration mentioned ; and this he the said *John* is ready to verify ; wherefore he prays judgment, if the said *Richard* ought to have or maintain his aforesaid action thereof against him, &c.

J. C. Bolton.

And the said *Richard* as to the said plea of Replication
the said *John*, by him above pleaded in bar, thereto.
says, That he, by reason of any thing by the said *John* above in his aforesaid plea alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because protesting that the said *John* did not deliver to him the said *Richard* the said hogshead of sugar in the said plea mentioned, in full satisfaction and discharge of all, or any, or either of the said promises and undertakings in the said declaration mentioned : *Nevertheless*, for replication in this behalf, the said *Richard* says, that he did not receive or accept the said hogshead of sugar, in full satisfaction or discharge of the said promises in the said declaration above mentioned, or of any or of either of them, in manner and form as the said *Richard* hath above in his aforesaid plea in that behalf alledged ; and this the said *John* prays may be inquired of by the country ; and the said *Richard* doth the like, &c. Therefore, &c.

T. Walker.

And the said *T.* by *A. B.* his attorney, Plea of tender
comes and defends the wrong and injury, to the whole
when, of the counts

except 4*l.* 4*s.*
in the decla-
ration.

N. B. This is
now the ge-
neral plea in
both courts.

when, &c. ; and as to the said several pro-
mises and undertakings in the said declara-
tion mentioned, except as to 4*l.* and 4*s.* par-
cel of the said several sums of money in the
said declaration mentioned, he the said T.
says, That he did not undertake and pro-
mise, in manner and form as the said Y. hath
above thereof complained against him, and of
this he puts himself upon the country : And
as to 4*l.* and 4*s.* parcel of the said several
sums of money in the said declaration men-
tioned, he the said T. says, That the said Y.
ought not to have or maintain his aforesaid
action in this behalf against him the said T.
to recover any further damages than the said
4*l.* and 4*s.* because he says, That he the said
T. from the time of making the said pro-
mises and undertakings in the said declara-
tion mentioned ; as to the said 4*l.* and 4*s.*
always hitherto was, and still is, ready to
pay to the said Y. the said sum of 4*l.* and 4*s.* ;
and the said T. before the suing forth of the
original writ of the said Y. to wit, on the
22d day of *April*, in the said year of our Lord
1783, at, &c. in the said county, tendered
and offered to pay to the said Y. the said 4*l.*
and 4*s.* ; which said 4*l.* and 4*s.* he the said Y.
then and there wholly refused to receive from
the said T. ; and the said T. now brings the
said 4*l.* and 4*s.* here into court, ready to be
paid to the said Y. if he the said Y. will accept
the same ; and this he is ready to verify ;
wherefore he prays judgment, if the said Y.
ought to have or maintain his aforesaid ac-
tion thereof against him, to recover any more

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or greater damages than the said 4*l.* and 4*s.* in this behalf, &c.

J. C. B.

And the said J. as to the said plea of the Replication said T. by him above pleaded, as to the said N. B. Join 4*l.* and 4*s.* parcel of the said several sums of issue to the money in the said declaration mentioned, non assumpsit, says, That he, by reason of any thing in that plea alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him the said T. to recover his full damages in this behalf; because he says, that the said J. did not tender or offer to pay to the said J. the said 4*l.* and 4*s.* in manner and form as the said J. hath above in pleading alledged; and of this he puts himself upon the country; and the said T. doth the like, &c. Therefore, &c.

T. W.

Join issue as to the non assumpsit, and at the end of the plea of tender, say: And hereupon the said plaintiff freely takes and accepts out of court here the said 4*l.* and 4*s.* so tendered and paid into court as aforesaid; therefore, as to the said 4*l.* and 4*s.* the said plaintiff is satisfied; and as to the trial of the issue above joined between the parties aforesaid: The sheriff is commanded, that he cause to come here on the morrow of *All Souls*, twelve, &c. by whom, &c. and who neither, &c. because as well, &c.

If the plaintiff accepts the money, and goes for further damages, then he must reply thus.

N. B. No serjeant's hand necessary.

And the said Roger, by J. S. his attorney, comes and defends the wrong and injury when, &c. and says, That the said Charles ought not to have or maintain his aforesaid action thereof against him, because he says, that

Plea of a judgment recovered in K. B. in case.

that heretofore, to wit, in *Trinity* term, in the twenty-third year of his present majesty's reign, the said *Charles* impleaded the said *Roger* in the court of our Lord the King, before the King himself, in a certain plea of trespass on the case on promises, to the damage of the said *Charles* of 60*l.* on occasion of the not performing the very same identical promises and undertakings in the said declaration mentioned, and such proceedings were thereupon had, in the said court of our said Lord the King before the King himself, at *Westminster*, that afterwards, to wit, in that very same *Trinity* term, in the twenty-third year aforesaid, the said *Charles*, by the consideration and judgment of the said court, recovered against the said *Roger* in that plea, 60*l.* for his damages which he had sustained, on occasion of the not performing the said promises and undertakings in the said declaration mentioned, and whereof the said *Roger* was convicted, as by the record and proceedings remaining in the said court of our said Lord the King, before the King himself, at *Westminster* aforesaid, more fully appears; which said judgment still remains in full force, strength, and effect, not in the least vacated, set aside, paid off, annulled, satisfied, or discharged, and this he is ready to verify by the said record; wherefore he prays judgment, if the said *Charles* ought to have his aforesaid action thereof maintained against him, &c.

T. Walker.

Repetition.

And the said *Charles* as to the said plea of the said *Roger*, by him above pleaded, says,
That

That he, by any thing in the above plead-
 alledged, ought not to be barred from having
 or maintaining his aforesaid action thereof **N. B. This is a complete
 issue without
 a rejoinder,
 and may be
 made up of
 course.**
 against him the said *Roger*, because he says,
 that there is not any such record of the said
 recovery against the said *Roger* at the suit of
 him the said *Charles*, remaining in the said
 court of our said Lord the King, before the
 King himself, at *Westminster* aforesaid, as he
 the said *Roger* hath above in pleading al-
 ledged; and this he the said *Charles* is ready
 to verify; wherefore he prays judgment, and
 his damages, by occasion of the premises
 aforesaid, to be adjudged to him, &c.; and **N. B. Need
 not be signed
 by a serjeant.**
 hereupon the said *Roger* is commanded, by
 the said court here, that he have the said re-
 cord here on the morrow of *All Souls*, at his
 peril; the same day is given to the said *Charles*
 here, &c.

And the said *S.* says, That he, by reason **Replication**
 of any thing by the said *J.* and *W.* above in
 pleading alledged, ought not to be barred **to a plea of a
 judgment re-
 covered in
 debt.**
 from having his aforesaid action against the
 said *J.* and *W.* because he says, that there is
 not any such record of judgment aforesaid
 recovered by the said *S.* against the said *J.*
 and *W.* remaining in the said court of our
 Lord the King, before the King himself, at
Westminster aforesaid, as they the said *J.* and
W. have above in pleading alledged; and
 this he is ready to verify; wherefore he prays
 judgment, and his debt, together with his
 damages, by reason of the detaining thereof,
 to be adjudged to him, &c. And hereupon **Need not be
 signed by a
 serjeant.**
 the said *J.* and *W.* are commanded, that
 they have that record here on the morrow of
All **2 Black. Rep.**

Special Pleas

All Souls, at their peril; the same day is given to the said S. here, &c.

Plea of bankruptcy in the defendant.

Says, That the said *William* ought not to have or maintain his aforesaid action thereof against him, because he says that he the said *Thomas*, after the 14th day of *May*, which was in the year of our Lord 1729, to wit, on the first day of *August*, in the year of our Lord 1782, to wit, at *London* aforesaid, in, &c. became a bankrupt, within the intent and meaning of the several statutes made, and now in force, concerning bankrupts; and that the several causes of action aforesaid, in the said declaration mentioned, did, and each, and every of them, did accrue before such time as he the said *Thomas* became a bankrupt, to wit, at *London* aforesaid, in, &c. and this he the said *Thomas* prays may be inquired of by the country, &c.

N. Grose.

Plea nullius record to an action on the judgment.

And the said *James*, by *Thomas Medley*, his attorney, comes and defends the wrong and injury, when, &c. and says, That the said *Joel* ought not to have or maintain his aforesaid action thereof against him the said *James*, because he says that there is not any such record of recovery against him the said *James*, at the suit of the said *Joel*, in manner and form as the said *Joel* hath above declared against him the said *James*; and this he is ready to verify; wherefore he prays judgment, if the said *Joel* ought to have or maintain his aforesaid action thereof against him, &c.

Need not have serjeant's hand, 2 Black. Rep. 816. 2 Wils. 74. conra.

And

Special Plea.

And the said *Joel*, as to the said plea of the Replication, said *James*, says, That he, by reason of any thing by him alledged, ought not to be barred from having or maintaining his aforesaid action thereof against him the said *James*, because he says that there is such a record of recovery against him the said *James* remaining in the said court of the bench here, in manner and form as the said *Joel* hath by his declaration above alledged; and this he the said *Joel* is ready to verify by the said record; and that the same may be inspected by the justices here, &c.; and because the said *Joel* hath not here ready the said record to be produced, day is given to the said *Joel* here, until on the morrow of *St. Martin*, to have the same before the said justices here; the same day is given to the said *James* here, &c.

Whenever the plea is signed by a serjeant, the replication must also be signed. *Barnes* 365.

Proceedings on an Issue of *Nul tiel Record*.

First, *Upon the Plea of a Judgment recovered in another Court.*

WHERE the judgment upon an issue When the
of *nul tiel record* is in debt, the rule issue on *nul*
should be, "unless cause within four days," *tiel record* is
that the defendant may have that time to rule is.
move

Proceedings on an Issue

move in arrest of judgment; but where the judgment is interlocutory, that reason fails, and a rule *peremptory* is given by the secondary, because the defendant may move in arrest of judgment after the inquiry executed. Where the proceeding is by original, and a general return day is given to bring in the record, the defendant ought to be called to bring in the record at the rising of the court *on that day*, unless it happens on the *Sunday*, then on the *next day*; and if he fail, you have the rule of course. You may give the day in a replication on a *general return* yourself, so as you make it *four days before the delivery of the issue*.

Of giving the day in the replication.

If by bill, the defendant must bring in the record on the day.

But where the proceeding is by bill, and the day given to bring in the record is a day certain, the record cannot be brought in after that day: But note, you may have another day appointed *nisi causa*, which the secondary gives you.

How to proceed where the action is in case.

Upon delivery of the issue of *nul tiel record*, which is ingrossed on the treble penny stamp paper, if the action be in case, you may indorse thereon, "*That in case judgment be given for the plaintiff, a writ of enquiry will be executed on such a day*," as well as upon a joinder in demurrer; and if the defendant's attorney does not pay for same, sign judgment. If he pays for the issue, then get a roll from the prothonotaries of the same term issue is joined; enter the whole issue thereon, then take the roll to the prothonotaries, pay for the entries according to the length or count, and docket same; leave it with Mr. Underwood, with a fee of 3s. 4d. who will take

take such roll to *Westminster*; the secondary will then order the crier to call the defendant to produce the record mentioned in the plea; at night draw up rule with the secondary, pay 8s. 6d.; take a treble penny stamp paper, enter part of the declaration thereon, file warrants of attorney, and then go to the prothonotaries, and the clerk will sign interlocutory judgment; pay prothonotary 2s.; clerk of the judgments 2s.; then proceed to execute inquiry, if notice is given on the back of the issue; but if not, you will then give notice forthwith, and proceed as *under title interlocutory judgment*.

If the action be in debt, enter the proceedings on the roll as before; file warrants of attorney, and sign judgment on a double half crown stamp paper; tax the costs, and sue out execution. *N. B.* The secondary first certifies upon the rule, at the expiration of the four days, that no cause hath been shewn; which certificate, you produce to the prothonotaries clerk at the time of signing judgment.

Second, Where defendant pleads Nul tiel Record to an Action on the Judgment in this court.

UPON delivery of the issue, enter the proceedings on the roll, and docket same; which being done on the day given by the record, have the roll of the judgment upon which you declare ready filed in the treasury; speak to Mr. Hopkins, or one of the criers, to bring same into court; pay him 6d.; Mr. Stubbs 2s.;

then the secondary on reading the issue joined, and the roll upon which the action is founded, will, in the evening, draw up a rule for judgment, which expires in four days; pay him 8s. file warrants of attorney, and sign judgment at the prothonotaries on a double half-crown stamp paper; pay prothonotaries 2s. 4d. clerk of the judgments 2s.

N. B. Where any person pleads a judgment or matter of record in the same court, the party so pleading the same shall, upon demand, give the attorney for the plaintiff a note in writing of that term, and number roll whereon such judgment or matter of record is entered and filed; and in default thereof, such plea is not to be received.

Pratt Reg. C. P. 245. vide p. 287.

County palatine.

Upon the issue of *nul tiel record*, if the record be in a county palatinate, there shall be a writ to the chamberlain to certify, &c. *Clif. Ent. 148.*; the like if it be in an inferior court, *Bro. Vad. Mecum. 244.* If the officer does not, there shall be a rule for that purpose. *Palm. 562.*

In this court, you cannot, after once a plea has been pleaded, plead any other as you do in the *King's Bench*, without special leave of the court.

Replication, Rejoinder, Surrejoinder, Rebutter, &c.

To compel plaintiff to reply, &c.

THERE is no precise time fixed upon for replying, &c. the party who is to do the act gives a rule for that purpose, and the other

other must, within four days, reply, &c. if not, a demand being made in writing, judgment, for want thereof, may be signed; and in order to compel the plaintiff to reply, &c. a rule is to be given for that purpose, thus, *Denn v. Fenn. Rule to reply. A. K. attorney.* Takethis to the secondaries office, Mr. Skinn, pay 1s. 10d. which expires in four days (if the proceedings have not laid dormant four terms); then make a demand thus:

In the Common Pleas, Denn v. Fenn. The Defendant Demand.
demands a replication in this cause, by yours, &c.

A. B. Attorney for the Defendant.

When the time is expired, and the replication is not delivered to you, search first at the prothonotaries office; and if not filed there, sign judgment on a double half-crown stamp paper; but file only one warrant of attorney in these cases, the plaintiff being out of court.

If no proceedings have been had for four terms, then there must be a whole term's rule to reply given, &c. (unless the cause has been staid by injunction or privilege), then it must be given before the assign day. If no proceeding for four terms.

A rule to reply, rejoin, &c. may be given at any time in term, or within sixteen days after, unless in *Easter* term, then in ten days. Within what time a rule may be given.

N. B. If you want time to reply, &c. a judge's summons may be had for that purpose, and draw up order as in other cases.

Demurrers.

IT has been already observed in the historical part of the proceedings in this court, that a demurrer confesses the facts as stated by the opposite party to be true; but denies that by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse according to the party which first demurs, *demoratur*, rests or abides upon the point in question.

A demurrer is either *general* or *special*, and must be signed by a serjeant, and in case of exception to the form or manner of pleading, the party demurring must set forth the cause of demurrer, or wherein he apprehends the deficiency to consist, which is called a *special demurrer*, *R. M.* 1654. *f.* 20.; but by a general demurrer the party does not shew any particular causes of demurrer: for if in the pleadings a matter is insufficiently alleged, so that the court cannot give certain judgment upon it, a general demurrer will suffice; and for want of substance a general demurrer is good.

After demurrer joined, the judges to give judgment according to right, without, &c.

By Statute 27 *Eliz. c.* 5. " It is enacted, that
 " after demurrer joined, the judges shall proceed
 " and give judgment according as the right shall
 " appear, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process or cause of proceeding (except those only which the party demurring shall specially and particularly set down and express with his demurrer); and
 " that upon such demurrer joined and entered, the
 " court

“ court shall amend all such imperfections, defects,
 “ and wants of form, other than those which the
 “ party demurring shall particularly assign.”

By the 4 & 5 Anne, c. 16. “ No exception shall These excep-
 “ be taken on a *general demurrer* of an immaterial tions shall not
 “ traverse, default of entering pledges upon any bill be regarded
 “ or declaration, default of alledging of the bring- on a general
 “ ing into court any bond, bill, indenture, or other demurrer.
 “ deed mentioned in the declaration or other plead-
 “ ing; default of alledging of the bringing into
 “ court letters testamentary, or letters of adminis-
 “ tration, the omission of *vi et armis, et contra pa-*
 “ *cem*, or either of them; or the want of averment
 “ of *hoc paratus est verificare*, or *hoc paratus est veri-*
 “ *ficare per recordum*, or for not alledging *prout*
 “ *patet per recordum*, or matters of the like nature.”

But for these defects a *special demurrer* must be delivered over.

A demurrer, after it is signed by a ser- Ingrossed and
 jeant, must be engrossed on a treble penny delivered.
 stamp paper, and either filed with the pro-
 thonotaries (*for which pay 2s.*) or delivered
 over to the opposite attorney; if it be a de-
 murrer for want of form only, the attorney
 may, for want of costs, have leave to amend
 by a summons before a judge; if he choose If argument
 to argue it, then he may either join in de- to make up
 murrer, by making up the demurrer book, the book.
 containing the declaration, demurrer, and
 joinder, and deliver it to the attorney on
 the other side; who is to pay for same, be-
 sides stamps, *4d. per sheet*, and also for en-
 tering his pleadings and warrant of attorney,
 or may wait for a rule to join therein.

But if the plaintiff's attorney will not If the plain-
 join in demurrer, or deliver the demurrer tiff's attorney
 book with the joinder thereon, then, in order will not deli-
 to compel him to join in demurrer, a rule ver the book
 must

for argument, must be given at the secondaries for that purpose (pay 1s. 10d.), which expires in four days, and make a demand thereof the same as a replication; if he deliver the joinder, then, in order to compel him to go to argument, apply to the secondaries for a rule that he may enter the demurrer upon record within a given day, or that you may do it for him; a copy of which being served, he may make his election; if he does not, you may proceed to make up the book, and deliver same; but you cannot make him pay for the pleadings, nor sign judgment for want thereof; therefore proceed to move for a *consilium* to argue the demurrer, the same as if you was attorney for the plaintiff.

How to proceed to argument.

This will save at the clerk of the warrants a post terminum.

The plaintiff's attorney having joined in demurrer, and the book delivered, the next step to proceed to argument is to make an entry of all the book on a roll of the same term the issue is joined in demurrer, which you get of the prothonotaries; file warrants of attorney, docket the roll at prothonotaries, pay for the entries 8d. per sheet; this done make a brief on a slip of paper, and write thereon the name of the cause, number roll, and the serjeant's name (fee 10s. 6d.) "To move for a *consilium*," (a day for arguing the demurrer) speak to Mr. Underwood to take it to Westminster-hall (pay 3s. 4d.), and on the motion being handed to the secondary, he will mark the roll as read in court; in the evening go to the secondaries office, and get rule drawn up (pay 5s.), a copy of which serve on the defendant's attorney, and at the time of drawing up the

rule set the cause down for argument (pay 1s.); this being done, copies of the demurrer book are to be delivered to the judge, by the plaintiff's attorney, pursuant to the following rule; pay judges clerks 2s. each, and copy on brief paper the book for a serjeant to argue it.

By rule *Mich. 6 Geo. 2.* "It is ordered, That Plaintiff's at-
 " from and after the last day of this term the plain- tory shall
 " tiff's attorney shall deliver all the demurrer books deliver all the
 " to the lord chief justice and the rest of the jus- demurrer
 " tices of this court, and the defendant's attorney books to the
 " shall pay the plaintiff's attorney for two of the judges.
 " said books two days at least before the day ap-
 " pointed for arguing such demurrer, or the de-
 " fendant shall not be heard by his counsel when
 " his cause comes on to be argued, unless such
 " payment be made as aforesaid."

For the future, in all demurrer books de-
 livered to the judges, let the counsel's names
 be inserted who signed the pleadings, and
 let the number roll and day of argument be
 set down on the outside of each book. *Trin.*
17. and 18 Geo. 2. Barnes 164.

By rule *Trin. 10 Geo. 1.* "It is ordered, That in If defend-
 " all cases where the defendant demurs to the ant demurs to
 " plaintiff's declaration, the defendant's attorney the declara-
 " or clerk in court shall be obliged to accept of tion, he shall
 " notice of executing the writ of enquiry on the accept notice
 " back of the joinder in demurrer. And in case of executing
 " where the defendant pleads such a dilatory plea, an enquiry on
 " that the plaintiff is obliged to demur to, that in back of join-
 " such a case the defendant's attorney, or clerk in der, or where
 " court, shall be obliged to accept of notice of plaintiff is
 " executing a writ of enquiry on the back of such obliged to de-
 " demurrer." demur to de-
 " defendant's plea,

then on the back of such demurrer.

If upon argument judgment goes for the If judgment
 plaintiff, draw up the rule with the secon- be for the
 dary, plaintiff, then

dary, and if the action be in case, trespass, or the like, the judgment is only *interlocutory*, and *not final*, which sign with the prothonotary on a treble penny paper, give notice of executing a writ of enquiry, and proceed to the execution thereof, and to final judgment.

If in debt.

But if the action be in debt, then sign judgment on a double half crown, enter an *incipitur* thereon, and get it marked by the clerk of the warrants; then take it to the prothonotaries, and the clerk will sign the judgment; pay in all *5s. 4d.* tax the costs, and then you are at liberty to sue out execution.

Judgment must be signed with the prothonotaries before you can give notice of enquiry.

Plaintiff obtained judgment upon arguing a demurrer in an action upon the case, and proceeded to execute a writ of enquiry, without getting judgment signed by the prothonotary, which the court held irregular, and set aside enquiry. *Barnes* 229.

Demurrer to part, and issue as to the other part; demurrer argued first.

If there be a demurrer to part, and an issue as to the other part, the issue generally stays till the demurrer is argued, but it may be tried first.

Irregular to move for a *confilium* before book delivered.

It will be irregular to move for a *confilium* before the paper book is delivered to the defendant's attorney, and court ordered a cause to be struck out of the paper for this irregularity. *Barnes* 163.

After order for time, the defendant may demur to the replication, if there be real cause.

If the defendant be bound by rule of court, or order of a judge, to plead an issuable plea, and the plaintiff replies, he may, notwithstanding, demur to the replication, if there is a real cause.

“ It

“ It is ordered, that no cause, in any term after Entering cause
 “ the end of this term, be put in the book of fees to be ar-
 “ this court to be argued after the last day of ar- gued.
 “ gument, unless the court be thereupon moved,
 “ and shall order it.” *R. T. 12 Geo. 1.*

There can be no argument on the four No argument
 last, and four first days of the term. 4 last, and 4
 first days.

In the Common Pleas.

*Trinity Term, in the 23d year of the
 reign of King George the Third.*

Middlesex, (ss.) John Denn, late of West- A general de-
minster, in the said county, yeoman, was ar- murrer book,
tached to answer Richard Fenn in a plea of where the de-
trespass on the case (go to the end of the decla- murrer is to
ration); then say, the declara-
tion.

And the said *John*, by *J. T.* his attorney, Demurrer.
 comes and defends the wrong and injury,
 when, &c. and says, that the said declara-
 tion, and the matters therein contained, are
 not sufficient in law for the said *Richard* to
 have or maintain his said action against the
 said *John*, to which declaration the said *John*
 hath no need, nor is he obliged by the law
 of the land to answer; wherefore, for want N. B. A ge-
 of a sufficient declaration in this behalf, the neral demur-
 said *John* prays judgment, and that the said rer must be
Richard may be barred from having and signed by a
 maintaining his aforesaid action thereof against serjeant.
 him, &c.

Thomas Walker.

And the said *Richard* says, That the decla- Joinder.
 ration aforesaid, and the matters therein
 contained, are sufficient in law for the said
Richard to have his aforesaid action thereof
 main-

maintained against the said *John*, which said declaration and the matters therein contained, the said *Richard* is ready to verify and prove, as the court shall award; and because the said *John* hath not answered the said declaration, the said *Richard* prays judgment, and his damages by occasion thereof to be adjudged to him, &c. And because the justices here will advise themselves of and upon the premises, before they give their judgment thereon, day is therefore given to the said parties here, until in eight days of the *Holy Trinity*, to hear their judgment thereon, for that the said justices here are not yet advised thereof, &c.

Geo. Wilson.

Demurrer to
a plea.

And the said *A.* as to the said plea of the said *C.* by him above pleaded in bar, says, that the plea aforesaid, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law for the said *C.* to bar the said *A.* from having or maintaining his aforesaid action thereof against him the said *C.*; and that the said *A.* is not under any necessity, nor is he bound by the law of the land, in any manner to answer thereto, and this he is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said *A.* prays judgment, and his damages, by reason of the premises, to be adjudged to him, &c.

T. IV.

Demurrer to
a replication.

And the said *John* says, that the said plea of the said *Henry*, by him above pleaded by way of reply to the said plea of him the said *John*, by him above pleaded in bar, and the matters therein contained, are not sufficient
in

in law for him the said *Henry* to have or maintain his aforesaid action thereof against him the said *John*; and that the said plea so pleaded in reply to the said plea of the said *John*, by him above pleaded and set forth, he the said *John* is under no necessity, nor in any wise bound by the laws of this realm to answer; and this he the said *John* is ready to verify; wherefore, for want of a sufficient replication in his behalf, he the said *John* prays judgment; and that the said *Henry* may be barred from having and maintaining his aforesaid action thereof against him the said *John*, and for causes of demurrer in law, according to the form of the statute in such case made and provided, he the said *John* shews to the court here the following causes, that is to say, for that the said plea of the said *Henry*, by him above pleaded by way of reply to the said plea of him the said *John*, by him above pleaded in bar, concludes to the country, whereas the same ought to have concluded to the court with an averment and prayer of damages, and not to the country; and also for that the said plea of him the said *Henry*, by him above pleaded by way of reply to the said plea of him the said *John*, by him above pleaded in bar as aforesaid, is in many other respects imperfect, insufficient, and wants form.

Nash Grose.

And the said *Henry* saith, That the said plea Joinder, by him the said *Henry*, in manner and form aforesaid above, by replying, pleaded; and the matter therein contained are sufficient in law for the said *Henry* to maintain his said action

tion against the said *John*, which plea; and the matter therein contained, the said *Henry* is ready to verify and prove as the court shall award. And because the said *John* doth not answer to the same plea, nor doth in any manner deny the same, the said *Henry* prays judgment, and his damages, by reason of the premises to be adjudged to him, &c.

J. Walker.

Continuance
over and judgment for the
plaintiff.

And because the justices here will advise themselves of and upon the premises, before they give their judgment thereon, day is given to the parties here until in *fifteen days of Saint Hilary*, to hear their judgment thereon, for that the said justices here are not yet advised thereof. At which day here came as well the said *Henry* as the said *John*, by their attornies aforesaid, and hereupon the premises being seen, and by the justices here fully understood, it seems to the said justices here, that the said replication, and the matters therein contained, are sufficient in law for the said *Henry* to have his aforesaid action maintained against him the said *John*, as the said *Henry* hath above alledged. Therefore it is considered, that the said *Henry* recover against the said *John* his damages, by occasion of the not performing the said several promises and undertakings: but because it is unknown what damages the said *Henry* has sustained by occasion of the not performing the said several promises and undertakings, it is therefore commanded to the sheriff, &c. (*Vide* a judgment by default, and final judgment thereon.)

J. Que.

Issue.

THERE are two cases in which the plaintiff may make up an issue forthwith, without waiting for a rejoinder; 1st, When the plea of defendant concludes to the country, the plaintiff may add the *similiter forthwith*, and deliver issue, and notice of trial: 2dly, When the plaintiff's replication concludes to the country, he may join the *similiter*, make up the issue, and give notice of trial forthwith: but if on delivery, the defendant's attorney does not pay for it, he then must give a rule with the secondary to rejoin, which expires in four days; and in that time, if he does not strike out the *similiter*, and deliver a demurrer, the issue is well delivered; and if not paid for on demand, judgment may be signed. If he does strike out the *similiter*, and demur to the replication, then he returns such issue back again to plaintiff's attorney, and writes on it thus, "*I have struck out the similiter, and demurred to the replication;*" and deliver the demurrer at same time. If defendant's attorney pays for the issue so delivered, it is an acceptance of it, and he waives a demurrer.

Vide rule
Trio. 2 Geo. 4
1. Hil. 6
Geo. 1. under
title, notice of
trial.

A frivolous demurrer to the replication, after a judge's order for time to plead, is not a good rejoinder, 2 Black. Rep. 923. and judgment may be signed, Barnes 168. Nesbitt v. Farmer; but if to the merits, it is good, Ibid.

In any other case, the issue cannot be made up until there is a complete issue joined between the parties.

How to make up the issue.

In this court, the attornies themselves ~~make up the issue in form, and deliver to~~ defendant's attorney a copy thereof, on treble penny stamp paper, he paying for the same after the rate of 4d per sheet (72 words), besides the duty; besides the entry of his plea, if special; 8d. per sheet, if it was not filed, and so rejoinder, &c. but if the general issue, only 2s. ; and for filing his warrant of attorney 8d. Note, if the issue be of the same term with the declaration, and the defendant has paid for one copy of the declaration, he is to pay for a copy of the declaration again, as well as all the other pleadings subsequent to the declaration, although in some books it is laid down the contrary.

What defendant's attorney to pay.

If the plaintiff has entered an appearance according to the statute, he may charge it on the back of the issue; and if the defendant's attorney will not pay for it, he may sign judgment; and if the issue be overcharged, the defendant's attorney may tender what is really due, and plaintiff cannot sign judgment. *Barnes 269.*

Prisoners do not pay.

Where the defendant is a prisoner, and he pleads in person, the plaintiff cannot sign judgment for not paying for a copy of the issue or demurrer book.

In country causes, to whom the issue is to be delivered.

In country causes the issue must be delivered to the agent in town, and not to the attorney in the country; and if the agent has been

been agreed between the country attornies, that the issue should be delivered in the country, and has been afterwards tendered to the agent in town, and not paid for, judgment has been signed, and held regular. *Barnes* 240.

But where the defendant has pleaded by his country attorney, and if not paid for by him, judgment may be signed.

Every attorney shall enter his warrant of attorney in every suit upon record in court, on pain of 10*l*. and further punishment by imprisonment at the discretion of the court. 30 *H. 8. c. 30. f. 2. 2 & 3 Ed. 6. c. 32. 18 Eliz. c. 14. f. 3.* Attorney to enter his warrant on record.

Warrants of attorney are to be filed of the term wherein any exigent is awarded, demurrer or issue joined, or judgment entered, which shall first happen, and to be filed upon or before the essoign day of every Trinity Term; and within twenty-one days after the end of every other term. *R. H. 14 & 15 Car. 2.* When to be filed.

Every plaintiff's attorney who shall prosecute any cause to issue, shall, upon the delivery of the copy of such issue, receive of the defendant's attorney the fee for filing his warrant therein; and in case the defendant's attorney shall refuse to pay for the same, the plaintiff's attorney may sign his judgment in like case, as if the defendant's attorney had refused to pay for the copy of the issue, or the entry of his plea; and the plaintiff's attorney shall file as well the defendant's as the plaintiff's warrant of attorney. *R. H. 2 & 3. Jac. 2.* Defendant's receipt of issue, to pay for filing warrant.

The plaintiff's attorney, in any action or suit, shall file his warrant of attorney with the proper officer, the same term he declares; and the defendant's attorney shall file his the same term he appears. *Stat. 4 & 5 Ann. c. 16.* Plaintiff to file his the term he declares, and defendant the term he appears.

Now let alone
till issue en-
tered or judg-
ment.

If attorney is
not found, is-
sue may be
left in the of-
fice.

The warrants of attorney are now let alone till the record is going to be passed, or judgment signed. *R. M. 5 Geo. 2.*

If the attorney is not to be found, the issue may be left in the office, and must be paid for at defendant's peril on demand. *1 Barnes 166.*

The method of making up the issue in this court, is like that of the King's Bench, by original, provided the proceedings are by original.

N. B. The practice of this court is to make up the issue the same term in which it is joined, although the plea be delivered many terms back.

In the Common Pleas,

Trinity Term, in the 23d year of the reign of King *George the Third.*

Issue by ori-
ginal.

Middlesex, to wit. *Richard Fenn*, late of *Westminster* in the said county, yeoman, was attached to answer *John Denn*, of a plea of trespass on the case (here go to the end of the declaration, "*suit, &c.*").

Then begin a new line, and enter the plea, if it be the general issue, thus :

Plea.

And the said *Richard*, by *Robert Spiggott*, his attorney, comes and defends the wrong and injury, when, &c. and says that he did not undertake and promise, in manner and form as the said *John* hath above thereof complained against him, and of this he puts himself upon the country; and the said *John Denn* doth the like. Therefore the sheriff is commanded, that he cause to come here, in three weeks of the *Holy Trinity*,

Award of the
venire.

twelve

twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

N. B. The award of the *venire* is on the general return day before the trial, if *per the sittings after term*; if *in term*, then the first return of the term.

If there are special pleadings, viz. *plea, replication, rejoinder, &c.* they must be entered exactly following each other, as they are delivered; and in the margin of the issue name them, as, *plea, replication, &c.*

Where there are two or more issues joined, then, after the words, *and the said plaintiff doth the like*, add these—Therefore as well to try this issue, as the said other issue above joined, the sheriff is commanded, that he cause to come here, in three weeks of the *Holy Trinity*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

Where there are two or more issues, how to make up issue. Venire upon several issues awarded.

How to make up an issue, where the defendant pleads separately.—In this case, you add to each copy of the issue the two pleas, and join the *similiter* to each of them, and then say, Therefore, as well to try the issue above joined against the said *John Denn*, as the said other issue above joined against the said *Job Nowell*, the sheriff is commanded, that he cause to come here, in, &c. (as above.)

How against two defendants, where one lets judgment go by default, and the other pleads.—Go to the end of the plea pleaded by defendant, and add the *similiter* thereto; then

say, And the said *Job*, in his own person, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *James*, by which the said *James* remains therein undefended against the said *Job*, for which the said *James* ought to recover against the said *Job* his damages, by reason of the premises; but because it is unknown to the court here what damages the said *James* hath sustained by the means aforesaid; and because it is also at present unknown to the court here, whether the said *John* will be convicted of the premises upon which the above issue is joined between the said *James* and the said *John*, or not; and because it is necessary and convenient that there be but one taxation of damages in this suit; therefore let the giving of judgment in this behalf be stayed, until the said issue between the said *James* and *John* be determined; and as well to try the issue above joined between the said *James* and *John*, as to inquire against the said *Job*, what damages the said *James* hath sustained in this behalf; the sheriffs are commanded, that they cause to come here, in three weeks of the *Holy Trinity*, twelve, &c. by whom, &c. and who neither, &c. because as well, &c.

Jurors to
come from
the proper
county.

By *Stat. 4 & 5 Ann. c. 16.* "The jurors are to "come from the proper county where the issue is "triable;" but this does not extend to actions on penal statutes.

If the venue is in a county palatine, there must be an award of a special *venire* and *mitimus*, as follows:

Therefore

If a Welch
issue.

And because the issue aforesaid, between the parties above joined, ought to be tried by men of the next *English* county to the said county of *Carmarthen*, and not elsewhere; and because the county of *Hereford* is the next *English* county to the said county of *Carmarthen*, therefore let a jury of the said county of *Hereford*, &c. come before our justices at *Westminster*, in three weeks of the *Holy Trinity*, who neither, &c. to recognize, &c. because as well, &c.

N. B. In a *Welch* issue, when tried in the next *English* county, the *jurata*, *venire*, and *habeas corpora juratorum*, are the same as if the venue was laid in that *English* county.

If there has
been a plea
in abatement,
how to make
up issue.

If there has been a plea in abatement, and judgment of *respondeas ouster* awarded, after which defendant pleads in chief, yet the plea in abatement ought to be entered in the issue, and *nisi prius* record; for as it is in the plea roll, it must be mentioned in the *nisi prius* record, otherwise it would not appear to be a trial in the same cause, and judgment would be arrested. *Carth.* 447.
5 *Mod.* 399.

How when
the sheriff is a
Party.

If the sheriffs are parties to the suit, go to the end of the *similiter*, then say, "And because it is suggested to the court here, that the said Sir *Robert Taylor* and *Benjamin Cole* is sheriff of the county of *Middlesex*, It is therefore commanded to the coroners of the said county, that they cause to come here, in three weeks of the *Holy Trinity*, twelve, &c. by whom, &c. and who neither," &c. And the *venire* and *habeas*

breas corpora are directed also to, and returned by the coroners; pay them same as you do the sheriff in all cases.

Of entering the issue. By rule. *E. 5 W. & M. & Hil. M. Geo. 1.* All issues are to be entered of the issue term they are joined. But if the plaintiff's attorney delays making the entry, defendant's attorney may get a treasury rule from the secondaries, for which pay 4s. 6d. for that purpose, and serve him with a copy thereof; if the defendant does not docket and carry in the roll complete before the time expired, (*viz.* four days after the service), he may sign a *non pros* for want thereof. If the rule is served on Friday, defendant has all Tuesday to enter the issue. *Barnes 318.*

If the action be laid in *London, Middlesex*, or in the country, defendant cannot give a rule to enter the same term it is joined, but must stay till the next term. When rule may be given to enter in town.

And if the plaintiff wants time, he may apply to a judge for a summons for that purpose; pay 2s. serve copy on defendant's attorney, and attend thereon, and the judge, on hearing, will give time for that purpose. How to get time to enter.

How to enter the issue pursuant to the rule. — How to enter the issue to prevent non-pros.
Get a roll from the prothonotaries office, of the term in which the issue is joined; make out the warrants of attorney of the same term, on a plain piece of parchment, thus:

In the Common Pleas, Easter term, in the 23d year of the reign of King George the Third. —

Middlesex to wit, Richard Fenn puts in his place J. U. his attorney, against John Denn, late of, &c. yeoman, in a plea of trespass on the case. Warrant of attorney for plaintiff.

Middlesex to wit. The said John Denn puts in his place Richard Roe, his attorney, The like for defendant.
at

Notice of Trial.

at the suit of the said Richard, in the plea aforesaid. Take it to the warrant of attorney office, and file it; pay 8*d.* in debt, case 1*s.* 4*d.* then take the roll to the prothonotaries; pay for the entries 8*d.* per sheet, and docket same.

N. B. The nature of the action must be expressed on the warrant of attorney, according as the case shall be, as thus: *In a plea of trespass and assault; in a plea of trespass, assault, and false imprisonment; in a plea of trespass, on the case; in a plea of trespass and ejectment; in a plea of debt; in a plea of trespass; in a plea of detinue.*

Notice of Trial.

Notice of trial in the country ten days at least.

NO cause whatsoever shall be tried at *nisi prius*, before any judge or justice of assize or *nisi prius*, or at the sittings at *London* or *Westminster*, where the defendant resides above forty miles from the said cities respectively, unless notice of trial, in writing, has been given at least ten days before such intended trial. Stat. 14 Geo. 2. c. 17. s. 4.

Eight days in town, if defendant lives within forty miles.

The practice is, if the defendant lives within forty miles of *London*, eight days notice, exclusive of the day, is to be given, where the venue is laid in *London* or *Middlesex*; but if the venue be laid in the country, then ten days exclusive must be given.

If defendant was arrested in town, and usually resided at *Dunkirk*, fourteen days.

Fourteen days notice of trial must be given, where the defendant resides above forty miles from *London*, though the defendant was arrested in, and the venue laid in town. 2 Black Rep. 1205. *N. B.* The defendant usually resided at *Dunkirk*.

When fourteen days requisite.

Defendant lived above forty miles from *London*, and plaintiff proceeded to trial at sittings

Notice of Trial.

sittings there, upon ten days notice; no defence was made, and defendant insisting that he was intitled to fourteen days notice of trial, moyed to set aside the verdict; and had a rule to shew cause, which was made absolute, *Cur.* Before this act, fourteen days notice was the settled practice; and unless necessitated, the court will not be bound by an act made to take away a benefit from defendants. The practice, or law of the court, cannot be taken away but by negative words, *viz.* there shall be no more than ten days notice; fourteen days notice, notwithstanding this act, still necessary. *Barnes* 305. *Bowler v. Jenkin.*

In all cases where there have been no proceedings for four terms, exclusive of the term in which the last proceeding was had, the party who desires to proceed again shall give a term's notice to the other of such proceeding; such notice shall be given before the essoign day of the fifth, or other subsequent term; a judge's summons, if no order be made thereupon, shall not be deemed a proceeding; but a notice of trial, though afterwards countermanded, shall be deemed a proceeding within this rule. *Ea.* 13 *Geo.* 2. But if the defendant has delayed the cause by injunction, then it being his delay, there needs not a term's notice of trial. 2 *Black. Rep.* 784.

Notice of trial is necessary, though the trial is put off by rule of court to a certain day. 2 *Black. Rep.* 798.

Notice of trial must be given to the agent or attorney in town. 2 *Barnes* 239.

Sunday

Sunday reckoned a day.

Sunday is accounted a day in these notices, so it be not on the day on which the notice is given.

If notice is given, and plaintiff does not proceed, he must give new notice,

If the plaintiff gives notice of trial, and proceeds not, he cannot try it without new notice, as before, unless by consent, or rule of court. *R. M.* 1654. *f.* 20.

But may continue to the next sitting.

In *London* and *Middlesex*, if notice be given for one sitting, and the plaintiff is not ready, he may give notice before that sitting, that he will try it the next sitting; and that to be held convenient notice. I take this to mean a continuance over.

Heretofore, where the plaintiff concluded in pleading *ad patriam* (to the country), he would not give notice of trial till the defendant had joined issue, which he was not obliged to do, till a four day rule for that purpose was expired.

Where the plaintiff concludes *ad patriam*, defendant bound to accept notice of trial on the back of the pleading.

“But now, in all cases where the plaintiff concludes *ad patriam*, the defendant’s attorney must accept notice of trial on the back of such pleadings, whether the same be delivered to the defendant’s attorney or agent, or left in the office; and such notice shall be as effectual as if issue had been joined.” *Trin.* 2 *Geo.* 1.

Where the plaintiff concludes *ad patriam*, defendant obliged to accept of notice of executing inquiry from the time notice of trial was given.

Where the plaintiff concludes *ad patriam*, and gives notice of trial on the back of the pleadings (pursuant to the above rule), if the defendant does not join issue before the rule is out, then, after judgment obtained, the defendant’s attorney shall be obliged to accept notice of executing a writ of inquiry, from the time that the notice of trial was given on the back of the pleadings. *R. Hil.* 6 *Geo.* 1.

Notice of trial, or inquiry, given

Notice of trial, or of executing a writ of inquiry, given to a defendant, when his attorney is known, is not good notice; but when

Notice of Trial.

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when his attorney is not known, then the notice may be given to the defendant. *Barnes* 300. 306, 307.

to defendant good, if his attorney is not known; aliter if he is.

In the Common Pleas.

John Lenn against *Richard Fenn*.

Take notice of trial in this cause, for the fittings after this present *Trinity* term, to be held at *Westminster Hall*, in the county of *Middlesex*, dated the day of *June* 1783.

Yours, &c.

To Mr. C. D. Attorney
nery for Defendant.

J. L. Attorney
for Plaintiff.

If it be *London* day, *At the Guild-* The like for
“ hall of the city of *London* ;” if tried at the *London*.
“ fittings within term, then say, “ *To be tried*
“ *at the first, second, or last sitting within this*
“ *present Trinity term, to be held at Westminster*
“ *Hall, in the county of Middlesex.*”

If in the country, say, Take notice of trial in this cause, for the next assizes to be held at *Oxford*, in and for the county of *Oxford*.
Dated, &c. Yours, &c.

Where the plaintiff may give a short notice of trial, as where the defendant has had time given him to plead, on taking short notice of trial, the plaintiff must give him as much notice as he can, two days at the least. *Barnes* 301.

Two days short notice in town.

Countermand of Notice of Trial.

THIS must be in writing; and if the Countermand be in *London* or *Middlesex*, and defendant of notice of trial two days in town.

Notice of Trial.

defendant lives within forty miles of *London*, *two days, exclusive of the day* in which the countermand is delivered, are sufficient. *Barnes* 298.

In the country *six*.

But if the *venue* be laid in the country, *six days* are to be given at least before the intended trial, *Stat.* 14 *Geo.* 2. c. 17.; or if the *venue* be laid in *London* or *Middlesex*, and the defendant lives above *forty miles* from *London*, *six days*, at least, must also be given.

In the Common Pleas. *Denn* against *Fenn*.

Countermand of notice of trial.

I hereby countermand the notice of trial given you in this cause. Yours, &c.—
Which is directed to, and served on defendant's attorney.

May not be given to the country attorney.

A countermand of notice of trial cannot be given in the country, but may be countermanded there. *Barnes* 298.

Continuance of Notice of Trial.

Continuance of a void notice may operate as a new notice.

A CONTINUANCE of a void notice of trial, given within the regular time, may operate as a new notice. 2 *Black Rep.* 1298. It is all one whether the plaintiff says, "I give you notice," or "I continue my notice," provided there be full eight days. *Prac. Reg.* C. P. 396.

Cannot continue a second time.

The plaintiff cannot continue his notice of trial a second time in the same term. *Barnes* 292.

Explanation

This is only given in *London* or *Middlesex*, which plaintiff may do; as for instance, if the plaintiff gives notice of trial for the first sitting

OF Putting off the Trial.

sitting within term, he may, by giving notice of continuance in writing, the day preceding the day of trial, for the second or third sittings in that term, or for the sitting after term.

I hereby continue the notice of trial in this cause to the sitting after this present Trinity term. Dated, &c. Notice of continuance.

Of Putting off the Trial.

IF one of the defendant's witnesses be out of the way, and cannot be subpoena'd to come to the trial of the cause, he must apply to the court to put same off, upon payment of costs. This motion requires *notice, and affidavit of the service*, and also affidavit of the absence of the witness, and that he is material, *Barnes* 437, 440. 452.; where he is, and when he is to come to town, or expected; and the motion must be made *two days before the day of trial*, or the court will refuse it. *Barnes* 438. 442. 444. The affidavit formerly was allowed to be made by the defendant himself, and by no other person, *Barnes* 437.; but lately, the court observing that there might be many cases in which a third person could swear another to be a material witness, and defendant himself could not, have allowed a third person to make it; and instanced a factor selling goods for his principal, and employing a porter to deliver them. *Barnes* 437. 448.

It appearing, the witness being material, was a matter that did not come to defendant's knowledge time enough to move two days

days before the last day appointed for trial, the same was put off. *Barnes*, 452.

If a trial is put off, the practice is only to put it off till the next term, and not for a longer period. *Barnes* 440.

The court suffered affidavits to be read, taken before a vice-consul abroad, *Barnes* 466. to put off a trial.

Notice of motion.

Take notice, that this honourable court will be moved on *Monday* next, or so soon after as counsel can be heard, that the trial of this cause may be put off until next *Michaelmas* term, on account of the absence of a material witness on behalf of the defendant.

Yours, &c.

In the Common Pleas. *A. B.* against *C. D.*

Affidavit to put off trial.

C. D. of, &c. the defendant in this cause, maketh oath and faith, That the issue was joined in this cause, this present *Trinity* term; and that notice of trial was given for the last sittings within the said term. And this deponent further faith, That *J. B.* of, &c. is a material witness for him this deponent, in the said cause, as he is advised, and believes to be true; and that he cannot safely proceed to the trial thereof, without the testimony of him the said *J. B.* And this deponent further faith, That he hath endeavoured to find the said *J. B.* out; and that he hath been to the house of the said *J. B.* and was informed that he was gone to *Exeter*, in the county of *Devon*; and that he this deponent hath sent there for the purpose of subpoenaing him; but that

the

the said *J. B.* is gone from there, as this deponent hath heard, and verily believes to be true; and that he this deponent cannot get any information where the said *J. B.* is, but is informed that he will be at home in one month; and that he this deponent hopes and expects to be able to procure the presence of the said *J. B.* within the first sittings of next *Michaelmas* term.

If it appears that the witness went out of town or abroad, or beyond sea, after notice given, the court will not put off the trial for it, as the defendant might have subpoena'd him in time. *Barnes* 326. Affidavit made of the absence of a material witness by the wife of the defendant, held insufficient. *Ibid.* 437.

The rule to shew cause is drawn up at the secondaries, pay 5*s.*; serve copy on the plaintiff's attorney, and shew the original; then make affidavit of the service of the rule, give brief to a serjeant to make the rule absolute, which being done, draw up rule at secondaries, pay for same 6*s.* 6*d.*; get appointment thereon at the prothonotaries to tax, then pay same. *N. B.* The costs must be paid forthwith, as the rule is conditional.

Costs for not proceeding to Trial.

IT has been determined, and is now the practice of this court, that if the defendant obtains a rule for costs for not going to trial, he shall not have a rule for judgment,

Costs for not proceeding to Trial.

as in the case of a nonsuit. *Barnes* 316. And as these costs are always allowed in the latter rule, there does not seem any necessity ever to move for the former one; but in case it should be thought requisite, the following is the mode of proceeding: Go to *Westminster*, and apply to the secondaries, who will move for a treasury rule, or give a brief to a serjeant with 1*os.* 6*d.* to move for same, which is granted of course, without an affidavit; draw up rule, and serve copy with the prothonotaries appointment on plaintiff's attorney; pay for rule 6*s.* When you attend the prothonotary to tax the costs, you must then have an affidavit of the fact, as follows:

Affidavit to move for costs for not going to trial pursuant to the rule of M. 1654.

A. B. of, &c. the defendant's attorney in this cause, maketh oath, and saith, That issue was joined in the said cause in *Hilary* term last past, and notice of trial was given thereon for the sitting after the said term; and that the plaintiff did not proceed to the trial thereof, nor did he countermand the same in due time, according to the rules of this honourable court.

N. B. If there are witnesses *extra*, or *sub-pana*, you may go on and shew this in the affidavit, as in an affidavit of *extra* costs.

The rule may be drawn up payable to the defendant or his attorney; but if payable to both, and the money on demand is refused, the defendant and his attorney must join in the affidavit for an attachment.

When the costs are taxed, a demand must be made by the defendant, if the rule is made payable to him; if to *either him or his attorney*, either may make the demand; if to both

both, then on refusal, make the following affidavit to move for an attachment :

J. W. of, &c. attorney for the defendant in this cause, and *Richard Fenn* of, &c. the above named defendant, severally make oath and say, And first this deponent *J. W.* for himself, saith, That he did yesterday personally serve the above named plaintiff with a true copy of the rule, and the prothonotaries *allocatur* thereon hereto annexed, and at the same time shewed him the said original rule and *allocatur* ; and that he this deponent did, at the same time, demand of him the costs allowed by the said prothonotary on the said rule, but that the said plaintiff did not then, or at any time since, *pay the same to this deponent, and the same now remains unpaid to this deponent ; And this deponent *Richard Fenn*, for himself saith, That he hath not received the said costs allowed by the said prothonotary on the said rule hereto annexed, but that the same now remains due and unpaid to this deponent.

N. B. In all cases where you move for non-payment of money, when the rule is made payable to the plaintiff or his attorney, both must join, and swear negatively to the receipt at the time of the affidavit being made.

Serjeant's fee is one guinea ; draw up the rule, and then make out an attachment against the plaintiff as follows (pay rule 6s. 6d.) :

George, &c. To the sheriff of *Middlesex*, greeting : Attach *J. C.* so that you may have his body before our justices at *Westminster*, on *Thursday* next after the morrow of *All Souls*, to answer us, of and concerning such things as

Costs for not proceeding to Trial.

on our behalf shall be then and there objected against him; and have then there this writ. Witness, *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the twenty-third year of our reign. For non-payment of 3*l.* 4*s.* costs taxed by Mr. Prothonotary *Dickins*, pursuant to a rule of court. Dated, &c.

The attachment is signed by the prothonotaries, pay 1*s.* 4*d.* seal 7*d.* warrant thereon 2*s.* 4*d.* and is to be returnable on a day certain, though the proceedings are by original.

Judgment as in case of a Nonsuit.

FORMERLY if the plaintiff did not proceed to trial after issue joined, the defendant was (after a rule given to the plaintiff to enter his issue, and he had done it in pursuance thereof) obliged to have a further rule for a record to be made by proviso, if the plaintiff had made default, but to prevent that expence, the *Stat. 14 Geo. 2. c. 17.* enacts, "That where any issue is or shall be joined in any action or suit at law, in any of his Majesty's courts of record at *Westminster*, great session of *Wales*, *Chester*, *Lancaster*, or *Durham*; and the plaintiffs in any such action or suit have neglected to bring such issue on to be tried according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges, at any time after such neglect, upon motion made in open court (due notice having been given thereof) to give the like judgment for the defendant

On the plaintiff's neglect to bring on an issue to trial, the court may give judgment as in case of a nonsuit,

“ defendant or defendants in every such action or
 “ suit, as in cases of nonsuit, unless the said judge
 “ or judges shall, upon just cause and reasonable
 “ terms, allow any further time for the trial of such
 “ issue; and if the plaintiff or plaintiffs shall neglect
 “ to try such issue within the time or times so allow-
 “ ed, then and in every such case, the said judge,
 “ &c. shall proceed to give such judgment as afore- and to have
 “ said; and all judgments given herein shall be of the like force
 “ the like effect as judgments upon nonsuit, and no as judgments
 “ other,” *sect. 2.* in nonsuit.
 “ Provided that the defendants shall, upon such Defendant to
 “ judgment, be awarded his, her, or their costs, in have costs.
 “ any action or suit where he, she, or they would,
 “ upon nonsuit, be entitled to the same, and in no
 “ other action or suits whatsoever. This statute The statute
 “ does not extend to a writ of right, so as to give does not ex-
 “ costs to the tenant, or a judgment, as in case of a tend to a writ
 “ nonsuit.” *2 Black. Rep. 1093.* of right.

In order to proceed to obtain this judgment after issue delivered, and the plaintiff has not tried his cause within that term (the same not being before entered on record), get a *side bar* rule from the secondaries office, for the plaintiff to enter his issue on record, which expires in four days after service; pay 5s.; serve copy on the plaintiff's attorney. When the four days are expired, go to the prothonotaries; search with them of the term in which issue is joined; if the issue roll is carried in, then proceed as follows; if not, sign judgment of *non pros.* Which see under title *Non Pros.*

In the Common Pleas.

Denn v. Fenn.

Take notice that this honourable court Notice.
 will be moved to-morrow, or so soon after
 counsel can be heard, that the like judgment

N. B. This notice is requisite in this court.

1733. Yours, &c.

To Mr. C. D. Attorney
for the Plaintiff.

In the Common Pleas.

John Derz, Plaintiff,
and

Richard Fe n, Defendant.

Admiral

Alexander Proen, of, *Esq.* Gentleman, attorney for the above named defendant, maketh oath, and saith, That issue was joined in this cause in *Easter* term last past, and notice of trial was given for the sitting after the said term, and that the said plaintiff did not proceed to the trial thereof pursuant to his said notice, And this deponent further saith, That he did personally serve *Mr. Charles Dodd*, attorney for the plaintiff above named, with a true copy of the notice hereto annexed.

N B. If I'll
in the trea-
sury, then get
the key to
bring it into
court.

Ingrofs affidavit on a 1s. 6d. stamp paper, swear it before a judge, and then speak to Mr. Underwood to have the roll in court; pay him 3s. 4d., give affidavit to a serjeant, with a fee of 10s. 6d. and he will move for the judgment as in the case of a nonsuit; in the evening draw up rule at the secondaries, pay 5s. 6d., serve copy thereof on plaintiff's attorney or clerk, shew the original, and on the day for shewing cause have affidavit of the service ready, and add these words, "*and at the same time shewed him the*" "*Verdict, &c.*" Give affidavit to a serjeant with a guinea, to move to make the rule absolute;

Judgment as in case of a Nonsuit.

absolute; which, if no cause shewn, is of course; then draw up rule at secondaries, pay 6s. if of common length; take same with a double half-crown stamp paper, make an *incipitur* of the declaration thereon to the prothonotaries clerk, and he will sign judgment; pay 7s. *sd*; then tax the costs, and take out execution.

On the part of the plaintiff, it is necessary for him to shew some reasonable cause why he did not proceed to trial by affidavit, such as the absence of a material witness; the plaintiff's own illness, that the defendant, by some act of his, hindered him from going to trial, or that the witnesses were ill, or absent, &c. not to be met with, or some other reasonable or unavoidable excuse, but in all cases it must be on payment of costs, unless by some act of the defendant, or his attorney, the trial was delayed. And note, peremptory undertaking to try the next sittings or assizes, will not do in this court.

If you shew the absence of a material witness, you must name him, and that all endeavours were used to find him out, and shew when he is to return.

Though further time for going to trial hath been given, yet upon reasonable cause, it may still be enlarged, notwithstanding the rule be peremptory. *Barnes* 315.

If costs are given, plaintiff must prosecute the rule, and pay costs, or judgment may be signed, by leave of the court, as the rule is conditional.

Judgment may be had in case of a nonsuit in replevin in this court (*Barnes* 317.), though the *K. B.* have determined the contrary.

What's necessary for plaintiff to shew by way of excuse.

The name of the absent witness must be shewn.

Though further time be given, yet upon cause shewn, be still enlarged.

This judgment may be had in replevin.

After a year's acquiescence, judgment as in case of a nonsuit, may be moved for without a term's notice. In *Trinity* term, 16 *Geo. 3.* issue was joined. Defendant moved for judgment as in case of a nonsuit; on shewing cause, it was contended, that as no proceedings had been for twelve months, neither party could now proceed without a term's notice; but the court held it otherwise, and that this motion was not within the rule of 13 *Geo. 2.*; but on hearing the merits, the court discharged the rule on the usual terms. 2 *Black. Rep.* 1223.

How to proceed for judgment after a peremptory rule obtained. If the court lets the plaintiff off upon a peremptory undertaking, and he does not bring on the issue to be tried in pursuance thereof, the defendant's attorney may apply for an office copy of that rule, and move the court for the like judgment as in the case of a nonsuit, for not having brought on the trial, pursuant to the rule of court, which will be granted to shew cause; and, *N. B.* Notice should be given of this motion anew.

Affidav t. *J. R.* of, &c. attorney for the above named defendant, maketh oath and saith, That this honourable court was moved last *Trinity* term for the like judgment as in the case of a nonsuit; and upon shewing cause, the plaintiff peremptorily undertook to bring on the issue to be tried at the sittings after the said term, whereupon the annexed rule was made; And this deponent further saith, That the plaintiff set down his cause for trial at the said sittings, but withdrew his record, and did not proceed to the trial thereof pursuant to the said annexed rule.

N. B. Let this be as the case is. *Affidavit* of service of the notice must be made.

Give this affidavit to a serjeant, with 10s. 6d. to move; in the evening draw up the rule at the secondaries, pay 6s.; serve copy

copy on plaintiff's attorney, make affidavit of the service thereof; give it to a serjeant, fee 1*l.* 1*s.* to make it absolute; and then in the evening draw up the rule at secondaries; pay 6*s.* and sign judgment as before.

Trial at Bar.

TRIALS at bar very seldom happen, and unless it appears to the court, that a question of law of some nicety will arise, and that this will be so complicated with a matter of fact, that the whole matter must be determined by the jury, under the direction of the court, it will not be granted. These trials are appointed by the *stat. of Westm.* 2. where the cause requires *magnam examinationem*. It has been granted in this court in an action for *crim. con.* *Rep. Cas. Praef. C. B.* 103. *Barnes* 438. upon an affidavit of defendant, that he had upwards of twenty witnesses to be examined, plaintiff having liberty to examine a witness before a judge, and defendant waiving his privilege of parliament, *Ibid.* And they are to be tried by a special jury.

In the affidavit the particular value or difficulty must be shewn; for it is not enough to swear generally, that there is value or difficulty therein. 1 *Barnes* 141. What ought to be stated in affidavit.

After issue joined (except in ejectment) you may move to have a trial at bar (but this cannot be had in *London*, the citizens not being to be brought out of the city); Cannot move till after issue joined.

nor are they generally allowed in issuable terms, nor the same term the motion is made, *Rep and Cas Prohl.* 66.; but I take it, upon appearance of the tenant in ejectment, and before issue joined, it may be made; and in such case it must be moved for in the new cause against the tenants who have appeared *Vide Str.* 696.

What affidavit ought to be taken in ejectment. In ejectment, the affidavit should state, " That the estates for which the same is brought is of the value of *per annum*, that there are many witnesses to be produced on each side, several of whom reside in remote parts in *B* and *W.* and others in *L.* and *M.*, and that deponent is advised, and believes, that the lessors of the plaintiff's title will in a great measure depend on the deduction of a long and intricate course of succession and descenders, and the effects and operation of several deeds and family settlements, and that a variety of points of law and other questions will arise at the trial; and deponent conceives, and is advised, it will be necessary that the cause should be tried at the bar of this honourable court by a special jury of the county of *S.* where the estates in question lie, if the court shall so think fit, and not before any one judge of assize."

How to obtain it. Upon the above affidavit being made, give it to a serjeant, and he will move for a rule to shew cause (see to him *ios. 6d*), draw up rule with the secondary, pay him *5* *bd.* serve copy, and shew the original. On the day of shewing cause, make a brief of affidavit, give same, and the affidavit of the service of the rule, with *one guinea* to move, to make it absolute, which, if done, draw up the rule, pay according to the length, because in this rule is contained a rule

Trial at Bar.

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rule for a special jury, make two copies thereof, serve one on the under-sheriff, and the other on the attorney on the other side, with the prothonotary's appointment thereon, attend on the prothonotary, and he will name 48 jurors, pay him 2*l.* 2*s.* sheriff 2*l.* 2*s.*, pay clerk to the prothonotary 5*s.* for copy (each side). When this is done, and you are ready to strike the twenty-four get a fresh appointment on the rule for that purpose from the prothonotary, serve copy of rule and appointment on the attorney of the other side, attend prothonotary, and he will strike out at your request twelve on each side. *N. B.* The plaintiff's attorney begins first to strike: this being done, a special *Hch. corp.* *jurisdiction* is made out as hereafter.

Although the trial is appointed by the court, yet the plaintiff is at liberty to countermand the notice of trial, and the same cannot be again brought to trial, unless some day be appointed by the court. Tho' trial is appointed, yet plaintiff may countermand.

Whereas rules for trials at the bar of this court are usually granted one or more term before such trials are appointed to be heard, and that the writs or *habeas corpus* or summoning the juries for such trials are made out upon *returnas* returnable in the preceding term, so that the attorneys for plaintiffs in such trials have always opportunities of giving timely notice to this court of the cert in days when such trials are to come on. And forasmuch as their neglecting to give such notice, it is found to be to the prejudice of other suitors in this court. It is ordered, "That the attorney for the plaintiff, in every cause, which in such case shall come to be tried at the bar of this court, shall, before the assign day of the term in which such cause shall be appointed to be tried, give notice to the chief prothonotary or se-

condary of the day it is appointed. " prothonotary of this court, or the secondary, of the day on which the cause is to be tried, that the same (as is usual) may be put down in the court book provided for that purpose. And in case such attorneys shall neglect so to do, that then, without motion, and the special direction of this court, such causes shall not be tried that term." *R. Hil. 9 Ann.*

And in case of neglect, then such cause shall not be tried. By rule, *M 3 Geo 2.* It is ordered, " That in all causes which shall be tried at the bar of this court, the lord chief justice, and the rest of the justices of the said court, shall respectively have copies of the issues in the said causes delivered to them, before the time appointed for trials of such causes."

Copies of the issues to be tried at bar to be delivered to the judges.

The court will grant a new trial after a trial at bar, upon proper cause, the same as in other cases.

Special Jury.

How to apply for a special jury. *VIDE the statute of 3 Geo. 2. c. 18.* Give brief to a serjeant with the name of the cause, and indorse thereon, "*To move for a special jury,*" (see 10s. 6d.) he will sign it, carry it to the secondary, and he will draw up rule (pay him 5s.), get an appointment thereon from the prothonotary to nominate the forty-eight, serve copy on the attorney of the other side, and the sheriff also must be served; attend prothonotary, and he will nominate the forty-eight (pay prothonotary 2l. 2s. sheriff 2l. 2s.), when this is done prothonotaries clerk makes out copies for each party (pay him 2s. 6d.). When you are ready to strike, then apply to the prothonotary for another appointment; serve copy,

copy, rule, and that appointment on the attorney; attend the prothonotary again, and he will strike out twelve on each side, beginning with the plaintiff first; the clerk then makes copies (pay 2s 6d. each), which reduces them to twenty-four, to try the issue, and a special writ of *habeas corpora juratorum* issues for that purpose. In London, he that strikes the jury, chuses his own officer to summons them, though the plaintiff issues the writ. In strictness, if defendant moves for the jury, he ought to sue out the writ of *habeas corpora juratorum* (but this is settled amongst fair practisers amicably), which ought always to be the case.

Cannot strike ex parte, still the third appointment.

“ The person, or party, who shall apply for a special jury, shall not only bear and pay the fees for striking such jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury, and shall not have any farther or other allowance for the same upon taxation of costs, than such person, or the party, would be entitled unto in case the cause had been tried by a common jury, unless the judge, before whom the cause is tried, shall, immediately after the trial, certify in open court under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury.” *Stat. 24 Geo. 2. c. 18.*

No costs of a special jury shall be allowed, unless the judge certify.

No person who shall serve upon a special jury, or be returned, shall be allowed to take for such serving on any such jury, more than the judge who tries the cause shall think just and reasonable, not exceeding 1l. 1s. (except in causes wherein a view hath been directed). *Same Stat.*

None to take more than one guinea, except where there is a view.

View.

FORMERLY there could not have been a *view* in personal actions, but upon withdrawing of a juror after they were sworn, and consent of the parties by a rule of court. Now by the Act 4 & 5 Ann. c. 16. s. 8. it may be granted in any action brought in the courts at *Westminster*, where necessary, the better to understand the evidence upon the trial, in which case the courts may order special writs of *distingas*, or *habeas corpora*, to the sheriff, requiring him to have six of the jurors, or a greater number of them, at the place in question some convenient time before the trial, who shall have the matter shewn to them by two persons named in the writ of *habeas corpora juratorum*, and appointed by the court, and the said sheriff executing the writ is especially to return the *view* made accordingly.

View may be granted in any action where necessary.

Six of the jurors, or more, shall have the view

By stat. 3 Geo. 2. c. 25. (the balloting act) s. 14. it is provided, "That where a *view* shall be allowed, six of the jurors named in the pannel, or more, shall have the *view*, and shall be the first juror (or such of them as appear) before any *trial* &c." But as the having a *view* was not by either of the statutes made a matter of course, though such a practice had prevailed, and had been abused for the purposes of delay, the court thought it their duty to take care that their ordering a *view* should not obstruct justice, and prevent the cause from being tried; and they

they resolved not to order one any more, without a full examination into the propriety and necessity of it: for they were all clearly of opinion, that the act meant that a view should not be granted, unless the court was satisfied that it was *proper and necessary*; and they thought it better that a cause should be tried upon a view had by any six, or by fewer than six, or even without any view, than be delayed for a greater length of time: Accordingly they added a clause to the usual rules for views, purporting that the party praying a view, consented "*That in case no view should be had, or if a view should be had by any of the jurors whomsoever (though not six of the first twelve) yet the trial should proceed, and no objection be made on account thereof, or for want of a proper return.*" Since which, motions for views are become motions of course, with such additional consent annexed to them. *Vide 1 Bur. Rep. 156.*

In the Common Pleas.

Trinity Term, in the 23d year of the reign of King George the 3d.

Dann v. Fenn. Tuesday, the 8th day of July, 1783. The rule. It is ordered, at the instance of the plaintiff, That a special writ of *Habeas corpus juratorum*, directed to the sheriff of Oxfordshire, according to the form of the statute in that case made and provided, shall issue, by which the said sheriff shall cause the place in question to be shewn to six or more of the jury, impanelled and returned, to try the issue between the said parties, or as many more of them as he shall think fit, to take a view of the place in question, on Monday,

the day of next, at eleven of the clock in the forenoon of the same day; which said jurors shall meet at the house of *John Cook*, known by name or sign of the *Blue Boar* in *Oxford*, who shall then and there be refreshed at the equal charge of the said parties; and that *John Doe* on the part of the plaintiff, and *Richard Roe* on the part of the defendant, named in the said writ, shall shew the place in question to those jurors, yet no evidence shall be then and there given to the said jurors; and the sheriff of *Oxfordshire* shall, by a special return upon the said writ, certify to the justices of assize, that the said view was had according to the command of the said writ.

On the motion of *Ser-*
jeant Walker, for the } By the Court.
 defendant.

Fotbergill.

Affidavit for a
view.

To be in-
grossed on a
treble six-
penny stamp.

In what ac-
tions views
are requisite.

W. C. of *Essex* gentleman, maketh oath, and saith, That the plaintiff's declaration in this cause is for a trespass supposed to have been committed by the defendants on the plaintiff's land or premises: And this deponent further saith, that he is informed, and verily believes, That the said defendants cannot safely proceed to the trial of this cause, without a view first had by some of the jury intended to be impanelled to try the issue in this cause.

In actions for trespass on land, or case for nuisances, a view may be requisite; and in actions for waste it is granted on the face of the declaration; but for obstructing a water-
 course

course, it was denied of course. *Barnes* 467. So that in all other actions (except waste) affidavit must be made of its being requisite and necessary to have a view; and it is to be given to a serjeant, with a fee of 10s. 6d. to move, draw up rule with the secondary, pay 8s. * apply to the opposite attorney for the name of the shewer, and have your's ready; so that the rule may be properly filled up, and also the house where the jurors are to meet; the day and hour must be inserted. When you have drawn up the rule, serve copy on the opposite attorney, leave the original, with the names of the jurors (if special) with the sheriff; if common, he has them, and he will summon the jury, pay him 2l. 2s.; his fee for attendance 1l. 1s.; and no evidence is to be given on the view, but the premises only are to be shewn. In town it is not usual to treat the jury as heretofore with dinners, but in the country it is, and at the expence of both parties. *N. B.* In vacation, by consent, you may have a judge's order for a view, upon producing the affidavit to the judge's clerk, by consent; if not, you may have a summons for that purpose; the judge cannot make an order, unless the attorney on the other side consents to it; but if he does not, then the judge will order the proceedings in the cause to be staid, and in both cases a serjeant's hand is requisite after the order obtained; fee 10s. 6d. rule & s. filing order 1s.

How to proceed.

* Country affidavit 2s. filing.

Record of *Misi Prius* by Original.

THIS contains the whole pleadings, and is to be ingrossed fairly on a double half-crown stamp parchment, and made up by the attorney for the plaintiff, and in this court the *placita* is wrote but once (*except on the death & change of a chief justice, or an old record*), in which case you write a second *placit* exactly as the first, of the term in which the cause is to be tried.

N. P. In an old ill, the first *placita* is to be of the term the *placit* is joined and delivered the second of the record, in which *placit* exactly as the first, of the term in which the cause is to be tried.

In the Common Pleas.

Record. *I was at Westminster before Alexander Lord Loughborough, and his companions, justices of our Lord the King, of the Bench, of Trinity Term in the twenty-third year of the reign of our Sovereign Lord George the Third, by the grace of God of Great Britain, France, and Ireland, King, defender of the faith, &c. Roll 34C.*

Middlese, to wit, Richard Tenn, late of, &c. gentleman, was attached to answer John Tenn of a plea of trespass on the case, and whereupon the said John, by J. S. his attorney, complains, that whereas, &c. (to the end of the issue, verbatim.)

If there be a demurrel to any of the pleadings, and the cause is to be tried before or after that be disposed of, all the proceedings must be entered on the *misi prius* record.

If on a plea in abatement, and a *respondeas* *ouster* is awarded, and afterwards the defendant pleads in chief, and there is a verdict for the plaintiff, yet the pleadings must be entered on record, or it is good cause for judgment to be arrested; for, as it must be entered on the roll (which is in court), so it must be mentioned on the *nisi prius* record, otherwise it will not appear to have been a verdict in the same cause. *Id. Regm.* 329.

Middlesex, (H.) The jury between *John Jurata*, *Denn*, plaintiff, and *Richard Lenn*, late of, *Essex*, gentleman, in a plea of trespass on the case, is respited here, until on the morrow of *All Souls* (the return of the habeas corpus writs), and which should be the next return after the day of trial), unless *Alexander Lord Leachborough*, the King's chief justice of the bench here, assigned by form of the statute in that case made and provided, shall first come on *Thursday* the 10th day of *July* (the day of the sittings), at *Westminster*, in the county, of *Middlesex*, in the Great Hall of Pleas there, for default of the jurors, because none of them did appear. Therefore let the sheriff have the bodies of the several persons mentioned in the panel annexed to the writ of *habeas corpus juratorum*. And be it known, that the justices here in court, in this same term, delivered a writ thereupon to the deputy sheriff of the county aforesaid, to be executed in due form of law. *Essex*.

N. B. If the cause is to be tried in *London*, say, "at the Guildhall of the city of London." If at the assizes, "unless his Majesty's justices assigned to take the assizes in

The Pleas of
the assize.

and for the county of Oxford shall first come on the day of July, at Oxford, in the said county, according to the form of the statute in that case made and provided, for default of the jurors, because none of them did appear." Therefore," &c. (as before).

A placita on
the removal
of the chief
justice in term.

Pleas at Westminster before Sir William de Grey, Knight, and his brethren, justices of his Majesty's court of Common Bench on the morrow of the Holy Trinity, in eight days of the Holy Trinity; and in fifteen days of the Holy Trinity, and before Sir Henry Gould, Knight, and Sir George Nares, Knight, justices of the said court, from the day of the Holy Trinity in three weeks, in Trinity Term, in the twentieth year of the reign of our sovereign Lord George the Third, by the grace of God of Great Britain, France, and Ireland, King, defender of the faith, &c.

Town and
country how
to pass record.

When the *nisi prius* record is prepared, you are to carry it, and the roll whereon you have entered the issue, to the prothonotaries office, who signs the record; pay 1s.; and for entering the issue 2s. a count, or if special 8d. per sheet: The clerk will mark both the record and roll; then file warrants of attorney, and the clerk will mark the record, go to the clerk of the treasury, Mr. J. J. at the chief justice's chambers, who will examine and see that the *jurata* is right; he will file the record; pay him at the sitting 1s. 6d., and also to him as clerk

clerk of the treasury, 2s. for the first three sheets, and 4d. for every other sheet, and 2s. 2d. for the seal. If three weeks after term 2s. for judge's warrant.

Then set down the cause with the chief in town how justice's marshal, pay him 13s. 9d.; leave to enter cause, the record and *habeas corpora juratorum*, with the sheriff's panel annexed thereto.

Apply to the judge's marshal, at the judge's lodgings in the country, deliver him the record, and writ of *habeas corpora juratorum*, with the sheriff's panel annexed, pay him 12s. How to enter cause in the country.

N. B. Get *habeas corpora juratorum* returned by the sheriff at the assize, the cause is returned in town by the agent of the under-sheriff, pay 2s. 6d., which is sent with the record into the country.

Attendance is given to pass records for London and Middlesex, at the chief justice's chambers in St. James's Hall, from ten to one in the morning, and from five to seven in the afternoon, and for the assizes at the same time, during the time of the assizes.

All attornies that shall have any records of *ne recipiatur* in London or Middlesex, shall enter the same in the marshal's book two days at least before the day of trial, or a *ne recipiatur* may be entred. *R. E. 1 f. 11. 2.* When ne recipiatur may be entred in London and Middlesex.

Ne recipiatur shall be allowed to be entred for the sittings of *ne recipiatur* after every term, unless the records of *ne recipiatur* and writs be made up and brought into court, on or before the day and sittings respectively. *Not.* Ne recipiatur may be entred unless the record of ne recipiatur be brought in.
Hist. 8 Geo. 1.

No record to be returned after the Middlesex unless entered within one day before the term, nor in London unless the day before the day of the day of the day.

On trial in the record cause entered in the first of the court

and the first in the order of the day entered.

A list of the matters entered in the court

If cause is docketed in the court

It is for the first time

No record or writ of *assumpsit* will be received at any sitting after term in *Middlesex*, unless delivered to, and entered with the marshal, within a day after the last day of every term, nor at any sitting after term in *London*, unless delivered to, and entered with the marshal the day before the day to which the sitting in *London* shall be first adjourned. And every *assumpsit* cause, in *London* or *Middlesex*, must be tried in the order in which it is entered (beginning with removers), unless ordered to the contrary by the judges, on reasonable cause shown. *New Loc. 2 Geo. 3.*

The writ in record to be entered with the marshal, before the first sitting of the court after the coronation day (except in the counties of *York* and *Northampton*), and there before the first sitting of the court, on the second day after the coronation day. *R. H. 14 Geo. 2.* And every cause must be tried in the order it is entered in, unless the court orders otherwise. *R. H. 14 Geo. 2.*

That a list of the causes entered, shall be made by the marshal, and forthwith fixed up in some public place in the *High Court*, there to remain during the whole time of the *term*. *Ibid.*

If you set the cause down to be tried for the *first, second, or third sitting* of the term, the same must be entered *before* such sitting, and shall be tried in the *order* in which the cause is entered.

It is for the first time after the *last* of the term will do, and the day before the adjournment day, before nine in the evening, or *before* *the* *term* may be entered.

If

Record.

If the cause is not tried the day of the sitting, it is then made a *remant* by the marshal or course, pay him 4s., get your *baileis corpora juratorum*, and alter the return to the next return day after the next sittings, and seal it, pay 1s.; annex it to the record again, and get the marshal to alter the *jurata* to the same return as the *baileis corpora juratorum*, there is no occasion to have a new panel returned, nor a new stamp.

After you have ingrossed the record, then make out a *venire facias*, and *baileis corpora juratorum* as follows, get the return returned at the sheriff's office, if in *Parliament*, Took's Court, Crutcher Street, if in *London*, at Wood Street on the *Parliament*, and N. B. Wood Street takes *N. B.* as and *High Court* for the return of the writs in this court, and the *Parliament*, *Crutcher* and *Trinity*, pay in *Middley* 14s. 6d., *London* 4s. 6d., if *Special* 3s. 6d.

Venire and Habeas Corpora Juratorum.

GEORGE the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the sheriff of *Middlesex*, greeting, We command you, that you cause to come before our justices at *Westminster*, in three weeks of the *Holy Trinity*, twelve free and lawful men of the body of your own county, each of whom having ten pounds of lands, C c 4 tenements,

tenelements, or rents by the year, at least, by whom the truth of the matter may be the better known, and who are in no wise of kin, either to *John Dunn*, the plaintiff, or to *Richard Fenn*, late of, &c. defendant (if the defendant be decreed against as executor or administrator, he must be here described as in the pleadings), to make a certain jury, of the county between the parties aforesaid, in a plea of trespass on the case (as the action is), because, as well the said *Richard* as the said *John* (the party who first takes the issue), between whom the matter in variance is, have put themselves upon that jury, and have there the names of the jurors, and this writ. Witness *Alia* in *Lord Loughborough*, at *Westminster*, the 20th day of *June*, in the 23d year of our reign.

Insert the cause of action in the *venire*, as the case shall be, thus: if in debt lay, in a plea of debt, if in case, in a plea of trespass on the case, if in assault, in a plea of trespass and assault, if for assault and imprisonment, in a plea of trespass, assault, and false imprisonment, if in ejectment, in a plea of trespass and ejectment, if in covenant, in a plea of breach of covenant; if in replevin, in a plea of taking and unjustly detaining his cattle, if in detinue, in a plea of detaining goods or writings.

Venire where one pleads and the other lets judgment go by default

If it is where one lets judgment go by default, and the other pleads to issue, after the words, "to make a jury of the county between the parties aforesaid," add these words, "as well to try the issue between the said *John* and *Richard* joined, of a plea of "trespass on the case, as to enquire what
"damages

“ damages the said *John* hath sustained, by
 “ reason of the not performing the said pro-
 “ mises and undertakings by the said *S.*
 “ made, as for his costs and charges by him
 “ sustained in this behalf, whereof it is con-
 “ sidered, that the said *John* ought to recover
 “ his damages; because, as well the said *S.*
 “ as the said *John*, between whom the con-
 “ tention thereupon is, have put themselves
 “ upon that jury, and have there the names,
 “ &c. Witness, &c.”

You carry this writ to the prothonotaries
 to be signed, pay 1s. 4d. seal 7d.

Take it to the sheriff's office, and get it
 returned by the sheriff, pay 2s. 6d; then
 make out a writ of *habeas corpora juratorum*
 thus:

George the Third, by the Grace of God, of *Habeas cor-
 Great Britain, France, and Ireland, King,* *pora jurato-
 Defender of the Faith, &c.* To the sheriff of *rum.*

Middlesex, greeting, We command you, That
 you have before our justices at *Westminster*,
 on the morrow of *All Souls* (the next return
 after the trial), or before the right honour-
 able *Alexander* Lord *Loughborough*, our chief
 justice, assigned to hold pleas in our court
 of the Bench. by force of the statute in such
 case made and provided, if he shall first come
 on *Thursday* the 10th of *July*, at *Westminster-
 Hall*, in your county, the bodies of the several
 persons named in the panel, annexed to this
 writ, jurors summoned in our court before
 our justices at *Westminster*, between *John* *Denn*,
 plaintiff, and *Richard* *Denn*, late of *Westminster*,
 in your county, merchant, of a plea of tref-
 pass

The day of
 the sittings
 when you in-
 tend to try the
 cau c.

pass on the cue (as the action is), to make that jur., and have there this writ. Witnels *He and Lord Justices of the Bench*, at Westminster, the 9th day of July, in the 23d year of our reign.
 Mr. Harrison signs his own name. *Harrison.*

These writs are printed upon a 2s. 6d. stamp parchment, and may be had at the stationers in black. Take the *Ha. cor. jurat.* to Mr. Harrison's, No. 6, in Castle Yard, Holborn, with the return, and Sherin's panel annexed thereto, pay him for signing *ha. cor. 1s. 6d.* (I will return and panel with him), then seal him, pay 7^{d.}, get a return thereof by the sheriff, pay 1^{d.}, unless you have already paid for it at the time of returning the return.

If in London. If the cause is to be tried in London, say,
 "if I shall be called, &c. at the Guildhall
 "of the city of London"

If at the assizes. If at the assizes, "call fore our justices as-
 "signed to try the assizes in and for the county
 "of Oxford, if they shall first come, on the
 "day of at Oxford, in the said
 "county," as before.

This rule is to be observed in causes tried in London and Assizes, returning the title and return of the return, and *breas cor-
 tation return*.

Take of venue return at the assizes. You return must be returned on the first day of the return, or within the first period (unless the return is made returnable on a general return, but always by the return, and the return of your return must be on the quarter day of the return day of your return, and the return must be returned on a general return.

return day after your cause is to be tried; as for instance, if your cause is to be tried the third sitting in Hilary term which we will suppose to be on the fourth of February, your venire must bear teste the 23d of January, and be returnable in fifteen days of Saint Hilary; and your habeas corpora will bear teste on the 30th day of January, being the quarto die post, and may be returnable on the morrow of the Purification. N. B. There is no occasion for fifteen days between the teste and return of either of these writs. See Stat. 13 Car. 2. c. 2. s. 2.

If your cause be tried after term, as for instance last Trinity term, then your venire is returnable in three weeks of the day trinity, and tested the 20th of June, being the first day of the term. The return of the habeas corpora on the morrow of All Souls, tested the 9th day of July, being the quarto die post of the last general return.

If after term, then how the cause is to be and return.

If to be tried at the assizes, then the venire is made returnable the last general return of the assize term, and tested the first day of that term; the habeas corpora will bear teste the last day of the assize term, returnable the first return of the term after the assizes.

G. King, &c. To the sheriffs of London, greeting, We command you, That you have before our justices at *Westm. per*, on the morrow of All Souls, or before the Right Honourable Alexander Lord Chancellor, our chief justice assigned to hold pleas in our court of the Bench, by some of the parties in that case made and provided, if he shall next come, on Friday the 11th day of July, at the Guildhall

Habeas corpora a juratozum for a special jury.

All of the said city, the bodies of Thomas German, of, &c. George Peters, of, &c. (here put the names and places of the special jurors from the prothonotary's paper exactly) merchants, jurors summoned in our court, before our justices at Westminster, &c. (the same as in the former one).

If there be a view, add these words.

And if there is a view to be had in the cause, add after the words (*o make that jury*) these: "*And in the mean time, according to the form of the statute in such case made and provided, we command you, That you have six of the first twelve of the said jurors, or as many more of them as you shall think fit, to take a view of the place in question, on the day of at (as in the rule) in your city, and proceed from thence to view the said place, in the presence of John Doe, of the part of the plaintiff, and Richard Roe, on the part of the defendant, appointed by our court of the bench, to shew the said place to such of the said jurors as shall come to view the same; and that you shall appear to our said justices at Westminster, on the said day, in what manner you shall have executed this. our precept, and that you have thereto this writ. Witness our hand at London, the 10th day of January, 1800.*"

Mittimus into a county palatine,

to be ingrossed on a 2s. 6d. stamp &c. &c. &c.

George the Third, &c. To our justices of our county palatine of Chester, greeting, The tenor of a certain record before our justices at London, between A. B. plaintiff, and C. D. late of, &c. defendant, in a plea of trespass on the case, We send you inclosed here in, commanding, that you (having inspected the same), by our writ of our said county,

county, do command the sheriff of the same county, that he cause twelve free and lawful men of the body of the said county, to come before you at your next session, after this writ shall be delivered to you, each of whom having 10*l.* a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and inquired into; and who are in no wise related either to the said *A.* or to the aforesaid *C.* to recognize and make a jury of the county, between the said parties, in the plea aforesaid; because as well the said *A.* as the said *C.* between whom the controversy is, have put themselves upon that jury; and also that you make such further process against the said jurors, so to be impanelled between the said parties, as are in this behalf used and commonly made, according to the law and custom of the said county, until the issue aforesaid, between the said parties, shall be fully tried; and when the verification and issue aforesaid shall be there made, and tried before you, then do you send the record of the said plaint, together with every thing that shall then and there be done before you therein, and also this writ, before our justices at *Westminster*, at a certain day which you shall appoint to the said parties, to be there to hear judgment thereupon. Witness *Alexander Lord Loughborough*, &c.

Take this to the prothonotaries; pay signing 1*s.* 4*d.* seal 7*d.*; the *venire* is made out in the county palatine, and annexed to this writ.

Sub-

Subpoena.

IF you have witnesses, and they will not appear, make out a *subpoena*, which is as follows :

Subpoena ac-
testificandum. *George the Third, &c. To John Doe,*
Richard Roe, John Stables, and Henry Flux,
N. B. Four greeting, We command and firmly injoin
witnesses may you and each of you, that laying all other
be put in one matters aside, and notwithstanding any ex-
subpoena. cuse, you be in your proper persons before
the Right Honourable *Alexander Lord Lough-*
borough, our chief justice of the Bench, on

The day and
time of the
sittings.

Monday the day of next, at
the *Guildhall* of the city of *London*, by nine
of the clock in the forenoon of the same day
(if at *Westminster*, say “ at *Westminster-hall*, in
“ the county of *Middlesex*”); if at the assizes,
say (“ before our justices assigned to take the
“ assizes in and for the county of *Oxford*, at
“ *Oxford* in the said county, by nine of the
“ clock in the forenoon of the same day”),
to testify all and singular what you or either
of you know, in a certain cause now depend-
ing, and undetermined in our court, before
our justices at *Westminster*, between *John Denn*,
plaintiff, and *Richard Fenn*, late of, &c. yeo-
man, defendant, in a plea of trespass on the
case (as the action is), on the part of the
plaintiff; and this you, nor any of you, are
not to omit, under the penalty upon each of
you, of one hundred pounds. Witness *Alex-*
ander Lord Loughborough, at *Westminster*, the
9th

9th day of July, in the 23d year of our reign.

This is already printed, and may be had at the stationers, on a 2s. 6d. stamp parchment; no *præcipe* for it is required, but take same to the prothonotaries office, and get it signed, pay 1s. seal 7d.; and each witness must be served with a copy; and if in town be paid 1s.; but if in the country, the party must have his expences tendered him, *Barnes* 33. 497.; nor will the court grant an attachment without *personal service*; and the witnesses are to have *reasonable notice*. Vide *Str.* 1054. 510.

Witness must be served personally so as to ground an attachment, and reasonable expences tendered if in the country.

Formerly, if the witness was to produce a deed or other writing, there used to be a *subpoena duces tecum* made out for the special purpose; but now the general mode is, either to indorse on the copy of the *subpoena*, or make a notice, which last is annexed to the *subpoena*, as thus: "Take notice that you do at the trial of this cause, produce a certain deed of assignment, bearing date the day of 1783, and made between, &c." (the same of a bond or other instrument), which answers the purpose of a *subpoena duces tecum*; but if some should not think this mode sufficient, then make out the following *subpoena duces tecum* for that purpose: George, &c. as in the former one, as far as the place of trial; then say, "And that you bring with you, and produce at the time and place aforesaid, a certain deed or instrument in writing, bearing date, &c. (describe the thing to be produced), and then" and

Notice to produce.

Subpoena duces tecum.

“ and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain action now in our court of the Bench, depending between (as in the former one).

Habeas corpus ad testificandum.

If a witness should be detained in prison, the following *habeas corpus ad testificandum* may be had to bring him into court as an evidence, on leaving which, and paying for the return, the gaoler must bring him up; but there must be an affidavit to ground the writ.

Affidavit in order to obtain habeas corpus ad testificandum.

A. B. of, &c. plaintiff in this cause, maketh oath, and saith, That *J. B.* now a prisoner for debt in his majesty's prison of the *Fleet*, is, and will be a material witness for this deponent at the trial of this cause; and this deponent further saith, That he is advised and verily believes, that he cannot proceed to the trial of this cause without the testimony of the said *J. B.*

This affidavit must be ingrossed on a treble sixpenny stamp, and sworn before a judge, who will grant his *fiat* for the *habeas corpus*; ingross the *habeas corpus ad testificandum* on a 5s. stamp parchment first, and take same to the judge with the affidavit, and he will indorse his name on the writ; pay him 4s. and 2s. swearing affidavit; take it to the prothonotaries, pay 1s. 4d. signing, seal 7d.; take writ to the warden (or other gaoler in whose custody the prisoner is), pay him for his return of *habeas corp.* 9s. 2d. if one cause.

George

Subpoena.

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George the Third, &c. To the warden of our prison of the Fleet, greeting (*or to the person in whose custody he is*); We command you, That you have the body of *John Wall*, in our prison, under your custody, as it is said, detained under safe and secure conduct, by whatsoever name the said *John Wall* may be called in the same, before the Right Honourable *Alexander Lord Loughborough*, our chief justice assigned to hold pleas in our court of the Bench, at *Westminster Hall*, in the county of *Middlesex*, or at *Guildhall*, in the city of *London* (if at the assizes), before our justices assigned to hold the assizes in and for the county of *Oxford*, on Monday the day of

Habeas corpus ad testificandum.

next, at *Oxford* in the said county, by nine of the clock in the forenoon of the same day, there to testify the truth, according to his knowledge, in a certain cause now depending in our court before our justices; and then and there to be tried between *John Denn*, plaintiff, and *Richard Fenn*, late of, &c. defendant, in a plea of trespass and assault (as the action is), and immediately after the said *John Wall* shall then and there have given his testimony before our said chief justice, to return him the said *John Wall* to our said prison, under safe and secure conduct; and have you there this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the 23d year of our reign.

It is said, that the party at whose instance a prisoner is brought up by virtue of a *habeas corpus ad testificandum*, in order to his being examined, and giving his testimony on his behalf at the trial, must take care that

D d

there

there be a good and sufficient guard with the witness; for the danger of the escape of the prisoner will be at the risque of the party who brings him up; the charge of which, and also of his being carried back again, must be borne by such party. *Styles Rep.* 128, 129. 119. 126.

Seven judges to five were of opinion, that a prisoner could not be brought up to give evidence (if he was in execution), so as to save the warden from an escape. *Barnes* 222.

Examining Witnesses on Interrogatories.

How to apply
in term.

IF after issue delivered, and notice of trial given, a witness that is material on either side, is going abroad or beyond sea, so that he cannot be had at the trial, the party who wishes for his testimony may apply to the court for a rule, that he may be examined as a witness before one of the justices of this court; it is a rule to shew cause, and the motion is made upon an affidavit of the facts, and of his being material on the part he is to be examined; and without whose testimony you cannot safely proceed to the trial; serjeant's fee, 10s. 6d.; draw up the rule at the secondaries, pay 7s.; make affidavit of the service, "*and of shewing the original rule;*" give it to a serjeant, with a brief of the affidavit to make absolute, fee 1l. 1s.; which if done, draw up rule absolute

lute at the secondaries, pay for same 7s. and serve copy thereof on the opposite attorney. *N. B.* Notice must be given on the other side, of the time he is examined, so that the other party may be at liberty to file interrogatories, and cross-examine him on his part.

If it is in vacation, application must be made in a summary way; get a summons from a judge for that purpose, pay 2s.; serve copy on opposite attorney; and when you attend the judge, produce to him the affidavit, though I think it would save time to give a copy at the time of serving the summons, and on attendance, if the attorney consents, the judge will make an order.

By Stat. 13 Geo. 3. c. 6. "Where the cause of action arises in *India*, and a suit is brought thereupon in any of the King's courts at *Windsor*, the court is empowered to issue a commission to examine witnesses upon the spot, and a mode is marked out for transmitting the depositions to *England*."

After a rule or order is made, the witness is to be taken to the judge's clerk, who examines him, and the interrogatories are to be left there, and he is to be sworn upon them; after he is examined on both sides, the judge's clerk delivers out the copies of the depositions taken to the attorneys, upon payment of 11d. per sheet; and for filing interrogatories, 2s.

The interrogatories are to be signed by a serjeant; pay him according to length; but

Interrogatories.

if small 1l. 1s.; ingross them on a double 12d. stamp parchment.

The form of interrogatories on behalf of the plaintiff.

Interrogatories to be administered to John Black, a witness to be produced, sworn, and examined on the part and behalf of John Denn, plaintiff, and Richard Fenn, late of London, merchant, defendant, before Sir Henry Gould, Knt. one of the justices of our Lord the King of the Bench, pursuant to a rule of the said court, made on the
 day of in the 23d year of the reign of his majesty King George the Third; or if it is by virtue of an order, say (pursuant to an order of the said justice of our Lord the King of the Bench, made the day of 1783).

Imprimis.

Do you know the parties, plaintiff, and defendant, in the title of these interrogatories named, or either, and which of them; and how long have you known them, either, and which of them? declare the truth, and your knowledge herein.

Secondly.

Look upon the deed or writing now produced and shewn to you, at this the time of your examination, marked with the letter A, and purporting to, &c. Was such deed or writing sealed and delivered in your presence, and by whom? were you a subscribing witness to the sealing and delivering thereof? and is your name indorsed and set as a witness thereto of your own hand-writing? and do you know the hand-writing of the other
 witness

Interrogatories.

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witness or witnesses thereto? And is or are the name or names of such witness or witnesses of the proper hand-writing of such witness or witnesses? And did you see them set any, and which of their names, as subscribing witness or witnesses thereto? Set forth the particulars at large, according to the best of your knowledge, remembrance, and belief, and the truth declare.

Lastly, Do you know of any other matter Last Inter-
or thing, or have you heard, or can you say gatory.
any thing touching the matter in question, in
this cause, that may tend to the benefit and
advantage of the complainant in this cause,
besides what you have been interrogated un-
to? Declare the same fully, and at large, as
if you had been fully interrogated thereto.

J. C. B.

Interrogatories to be administered to Richard Fenn, a witness to be produced, sworn, and examined on the part and behalf of C. D. the defendant, at the suit of A. B. before, &c. as in the other.

Interrogato-
ries for de-
fendant.

If a witness going to sea be examined upon interrogatories before a judge, and the trial comes on before he is gone, his deposition shall not be read, but he must appear; for the rule in such case is made on a supposal of his absence. *Salk. 691.*

If the witness
does not go
after being
examined, the
interrogato-
ries shall not
be read.

A. F. of, &c. mariner, late master of the ship D., the above-named defendant, maketh oath, That this action is brought against him for an assault, supposed to have been comitted by him on the said plaintiff, who was a

Affidavit to
ground mo-
tion for a wit-
ness to be ex-
amined upon
interrogato-
ries

mariner belonging to the said ship, and on board the ship *L.* in the month of *February* last, when the said assault is charged to have been committed; and this deponent further saith, That *B. S.* of ———, merchant, was a passenger on board the said ship *L.* at the time the said assault is supposed to have happened, and is, as this deponent is advised, and verily believes, a material witness for him in his defence of the said action; and that the said *W. S.* is about to leave this kingdom on *Monday* or *Tuesday* next, or before, as he has informed this deponent, and as this deponent verily believes.

Postea.

Associate indorses the postea, after verdict on the back of record.

POSTEA is a return of the judge before whom the cause is tried, after a verdict of what was done therein, and is indorsed on the back of the *nisi prius* record.

When the cause is tried at the sittings in *London* or *Middlesex*, the associate indorses the *postea* upon the back of the record, and on the fifth day after the return of the *hab. corp. jurat.* (if the defendant does not within that time either move in arrest of judgment, or for a new trial): call on him at the chief justice's chambers for same, then get it stamped with a double half crown stamp at the stamp-office, and go to the prothonotaries office, who will enter the cause, and take for the signing of the judgment *7s. 4d.*; take the *postea* to one of the prothonotaries, and he will tax your costs thereon.

N. B.

N. B. There is no rule given for judgment in this court, but you wait the four days.

Every clerk of assize, and the associate to the Lord Chief Justice, shall make returns of *postea* upon records issuing out of this court, whereupon any proceedings have been by virtue of any writ of *nisi prius*, *distingas*, or *habeas corpora iustorum*, and cause the same to be delivered to the prothonotaries of this court, upon the *quarto die post. R. E.* 2 *Fac.* 2. and take the fees for the return thereof.

Clerk of assize and associates shall make returns of *postea*, &c. to prothonotaries.

Where final judgment shall be signed upon a *postea*, the *postea* shall immediately be left with the clerk of the judgments of the prothonotary, and shall not afterwards be taken out of the office without leave of the court. *Stat. 13 Geo. 2.*

Postea to be left in the office on signing judgment.

Taxing Costs.

If you have *extra* costs, an affidavit of the expenses is necessary to be made before you tax them; in country causes, affidavits are generally made; and if sworn there, get one of the secondaries to mark it before you tax the costs; he is supposed to make an office copy, for which he is paid *8d. per sheet*, besides stamps; but if the office copy is not wanted, then on payment to the secondary of *8d. per sheet*, he will let you take the original to tax the costs with, which the prothonotary keeps, and sends over to the secondary to file; and **N. B.** It is usual to send the

Taxing costs if extra.

Taxing Costs.

copy of affidavit to the opposite attorney, for which is allowed 4*d.* per sheet.

It is also usual among fair practisers, to give the opposite side notice of taxing costs, without a rule; *but if you cannot rely on the attorney*, then apply to the secondaries of-
fice for a side bar-rule to be present, pay 4*s.*; serve copy on attorney of the other side, and he then must give notice. If either party should die before execution issued, then the judgment must be revived by *fi. fa. Stat.*

9 *W* 10.

In the Common Pleas. *Dean v. Fenn.*

Affidavit of
increase cost.

A. B. of, &c. the plaintiff in this cause, and *E. B.* of, &c. attorney for the above named plaintiff, severally made oath, and say, And first this deponent *C. B.* for himself saith, That notice of trial was given in this cause for the last assizes, to be holden at *Oxford*, in and for the said county, and that he did cause three subpoenas to be issued out on the part of the said plaintiff and that *A. L.* of, &c. *C. L.* of, &c. *E. A.* of, &c. *G. H.* of, &c. *J. K.* of, &c. [insert the names of the witnesses, and their places of abode, with their addition of trade, &c.] were all of them severally subpoena'd on the part of the plaintiff, and that the place of residence of the said *A. L.* *C. L.* and *G. H.* is distant from this deponent twelve miles; And this deponent further saith, That all the said witnesses were material and necessary for the said plaintiff; and that the said *A. L.* &c. were all paid with their subpoenas 1*s.* each, and that the said *A. L.* &c. [here again name the witnesses] were

Caring Costs.

were necessarily absent from their places of abode in going to, and returning from the said assizes three days; and this deponent was also necessarily absent from his place of abode three days; and that the usual place of abode of the said *A. L.* is distant from Oxford thirty-seven miles; and that the usual place of abode of the said *C. L.* is distant from Oxford ten miles [*go on and shew the distance of every witness from the assize town*]; And this deponent further saith, That the said *A. L.* was very old and infirm, and that he was obliged to hire a post chaise for her, from her place of abode to the said assizes, and back again (she the said *A. L.* not being able to travel in any other way), and that he did pay for the same the sum of 5*l.* 10*s.*; and that he did also pay to her for her loss of time, trouble, and expence, the sum of 4*l.* 4*s.*; And this deponent further saith, That he did pay to the said *C. L.* *B. T. G. H. &c.* for their loss of time, trouble, and expence, the sum of 3*l.* 10*s.*; And this deponent further saith, That his brief consisted of five sheets of paper, and that he did pay to Mr. *Bearcroft* with his brief and clerk 4*l.* 6*s.* 6*d.* and to Mr. *Baldwin* and his clerk 2*l.* 4*s.* 6*d.* and the following court fees, to the marshal for entering the cause, 12*s.*; to the jury, tipstaff, and bailiff, 14*s.*; to the marshal and crier, 17*s.*; and to the associate, 1*l.* 15*s.* 6*d.*; And this deponent *A. B.* for himself saith, That he did pay for the expence of himself and witnesses, pending the said trial, the sum of 5*l.* 10*s.* 6*d.*

It is impossible to form a general precedent for an assize of increased costs, as every cause

N. B. The briefs ought to be produced in all cases.

taxing Costs.

cause varies so much in expence and circumstances, therefore you have nothing more to do than state the facts; but it must be with certainty, as the prothonotary cannot ascertain the expences of the witnesses without, and with that you are to shew that every thing is *necessary and material as far as your belief goes*, to be produced on the part of your client; and the *place of abode* of your witnesses must also be *shown*, with their distance from the *place* where the *assizes* are held, otherwise they cannot be allowed for.

Special Verdict.

How to proceed on a special verdict.

IF there is a special verdict, the plaintiff's attorney with the defendant's, generally get it settled, by consent, by the two serjeants who sign the same, which is then left with the associate to be copied for each party; pay 8d. *per sheet*; after it is done, take it to Mr. Underwood at the prothonotaries, who will make six copies thereof, *viz.* four for the judges, and two for the serjeants on each side, pay for same 2s. 4d. *per sheet*. This the plaintiff's attorney does, and delivers three to the defendant's attorney; if he does not pay for them, then the plaintiff's attorney may deliver the four to the judges; pay each clerk 2s.; and when it is entered on the roll, give brief to a serjeant with 10s. 6d. to move for a *curriculum*, who signs it; take it to the Secondaries at *Westminster*, and have the roll in court; they will mark the roll, and

and in the evening draw up rule for argument with the secondaries, pay 5s.; set the cause down with them, pay 1s.; serve copy of the rule on the attorney of the other side; give brief to a serjeant to argue on each side; if judgment is given, draw up rule with the secondary, pay 5s.; then tax the costs as in other cases.

If a special case is made, then it is settled Special case, by the two serjeants, and signed; give same to the associate, and he will make copies for each; pay 8d. per sheet; move for a *concilium* as before, and draw up rule for argument with the secondary, pay 5s.; make four copies for the judges; each attorney makes two, and delivers them; plaintiff's attorney delivers two, *viz.* to the chief justice and senior judge, and the defendant's attorney to the two puisne judges.

By rule *M. 1654. f. 23.* That on finding special verdicts where the points are single, and not complicated, and no special conclusion, the counsel, if required, do subscribe the points in question, and agree to amend omissions or mistakes in the *mesne* conveyance, according to the truth, to bring the point in question to judgment. Counsel to subscribe the point in question.

That unnecessary finding of deeds *in* Deeds to be found according to the substance. *læc verba*, where the question rests not upon them, but are only derivation of title, to be spared; and found shortly according to the substance they bear in reference to the deed, as feofment, lease, grant, &c.

By rule, *E. 27 Car. 2.* It is ordered, Copies of special verdicts and demurrers to be de- That every attorney shall deliver true copies of the record of special verdicts to the respective

Special Verdict.

Delivered to the justices one week before the day.

Two by the plaintiff's, and two by the defendant's attorney.

Nor any argument till the books be delivered.

Attorney on either side may deliver all the books, and shall be reimbursed or allowed it in costs.

pective justices of this court, by the space of one whole week at the least next before the day appointed by such argument; namely, the attorney for the plaintiff one copy thereof to the lord chief justice, and another to the senior judge; and the attorney for the defendant, like copies on each of the other two justices.

That no argument by counsel on either side shall be heard at the bar, until books be delivered to all the judges; provided nevertheless, that in case the attorney of either party shall not deliver books as he ought, then if the attorney on the other side, for expediting his client's cause, will deliver books to all the judges, three days at the least before the argument, counsel shall be heard on his client's behalf at the day appointed; and the attorney delivering books as aforesaid, shall be imburshed the charges of delivering the two books, which ought to have been delivered by the attorney of the adverse party; which charges the said attorney shall be bound to pay upon demand thereof.

N. B. The court will refuse to hear counsel upon the argument, unless the books are paid for by the defendant's attorney.

Of Arresting the Judgment.

Arrest of judgment.

AFTER verdict, a man may alledge any thing in the record in arrest of judgment, which may be assigned for error after judgment, 2 *Roll. Ab.* 716. So after interlocutory, before the principal judgment, *Crok.*

Of Arresting the Judgment.

Croki Eliz. 914. 235. And judgment after verdict shall not be arrested for an objection that would have been good on demurrer, 3 *Bur.* 1725.

After judgment on demurrer, defendant shall not come to arrest judgment on the return of the inquiry, for an exception that might have been taken on arguing the demurrer *secus*, in case of judgment by default, or if the fault arises on the writ of inquiry or verdict. *Str.* 425.

Motion in arrest of judgment, in this court, must be made before or upon the appearance day of the return of the *habeas corpora juratorum*. Barnes 445. And if it is moved on the last day of term, there must be notice given, which will require an affidavit of the service. *Ibid.* 247.

Judgment shall not be arrested, because the defendant's name is put in two counts instead of plaintiff's. 3 *Wils.* 40.

If after verdict the party would move in arrest of judgment, you must desire the associate to have the record of *nisi prius* in court the day you mean to move; pay him 6s. 8d.; give brief to your serjeant, to move, "that the entry of the final judgment be stayed until the court shall otherwise order." In the evening draw up the rule, which will be in these words: "Upon reading the record of *nisi prius* between the said parties, it is ordered, that the entry of final judgment upon the verdict found for the plaintiff be stayed until this court be moved on behalf of the plaintiff, and shall otherwise order: let notice of this rule be given to the plaintiff, his attorney or agent, and let notice of the mo-

How to move.

The rule

Of Arresting the Judgment.

"tion to discharge this rule be given to the defendant, his attorney, or agent;" pay serjeant's fee, one guinea at least, rule 5s.; serve copy on plaintiff's attorney.

How plaintiff is to proceed.

If the plaintiff means to discharge the rule, he must give notice thereof thus: "Take notice, that this honourable court will be moved to-morrow, or so soon after as counsel can be heard, that the rule made in this cause the day of last may be discharged." Serve copy on defendant's attorney, and make affidavit of the service; give brief to a serjeant, and he will then argue the point; fee discretionary.

How to proceed if judgment arrested.

If judgment is arrested, then draw up rule in the evening with the secondary (pay 5s.); serve copy on plaintiff's attorney; there are no costs allowed.

If the rule is discharged, then plaintiff's attorney draws up rule, and may proceed to tax his costs in the usual way.

How to move upon an inquisition.

If you move to arrest the judgment upon the inquisition, and the same is not taken from the sheriff, give him notice to produce it in court, in order to move for the rule; pay him 6s. 8d.; make affidavit of the service, lest he should not produce same. If the plaintiff's attorney has it, then give him notice to produce it, and make the like affidavit; then proceed as before.

With regard to arrest of judgment upon matter of law, this rule is to be observed, "*That whatever is alledged in arrest of judgment, must be such matter as would, upon demurrer, have been sufficient to overthrow the action or plea.*" But this rule will not hold

e con-

New Trial.

e converso, viz. "That every thing that may be alledged as cause of demurrer will be good in arrest of judgment; because many omissions and defects, if not taken advantage of in time, are cured after verdict by the statutes of *jeofails*."

New Trial.

IF the party against whom the verdict is obtained on trial, or judgment on enquiry of damages, wishes for a new trial, or inquisition, he must move for the same before or on the *appearance day* of the return of the *habeas corpora juratorum*, or inquiry (if by original), unless the foundation of the motion be some matter discovered afterwards, *Barnes* 443.; but if it be returnable on a day certain, then four days after that day; and the motion is generally made on an affidavit (*unless it arise from a verdict given contrary to evidence, a misdirection of the judge at nisi prius, 2 Wils. 273. or where the jury have given excessive damages*), of some new matter being discovered since the trial. But they will not grant a new trial in penal actions. *3 Wils. 59.*

Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the courts have never granted new trials, notwithstanding the judge (before whom

Moved for before or on the appearance day of the return of the ha. corp. jurat. unless, &c. and by original.

Though the strength of evidence was against the verdict, new trial refused.

whom the cause was tried), hath been of opinion that the strength and weight of evidence was against the verdict. 3 *Wils.* 47.

Court will not grant a new trial, where there has been a verdict on the honest side.

After a verdict on the honest and just side of the cause, the court will support it if possible, and not grant a new trial. 2 *Wils.* 306.

New trial granted after a nonsuit.

After a nonsuit by order of the judge improperly, the court granted a new trial without costs. 3 *Wils.* 146. 338.

It is said that in ejectment, where a verdict is for the defendant, it is not usual to grant a new trial, because the plaintiff may bring a new ejectment, and no other disadvantage happens to him; but where the verdict is for the plaintiff, a new trial is often granted; for then the consequence of not granting a new trial is the alteration of the possession of the premises. See *Barnes* 440. *Vide title Ejectment.*

New trial not granted because counsel thought it prudent not to call evidence which they had in their briefs.

A new trial not granted, because the counsel thought it prudent to omit evidence which they had in their briefs, and might have offered in mitigation of damages; nor because another jury, in a cause between the same parties nearly similar, where such evidence was offered, gave a different verdict. 2 *Black. Rep.* 802.

Verdicts may be set aside for excessive damages, but not for smallness; and where the damages are not unreason-

Verdicts have been frequently set aside for excessive damages, but never for smallness; and in an action against a tavern-keeper for imprisonment a few hours, 300*l.* was given, 2 *Wils.* 160.; so against a journeyman-printer, for six hours, 300*l.* 2 *Wils.* 205.; so against the king's messenger for im-
imprisonment.

for imprisonment of an attorney, 1000*l.* for able, court will not grant a new trial: six days, 2 *Wils.* 444.; so in an assault about the property of a turtle, 200*l.*; for a malicious prosecution of a baronet, 10,000*l.* 2 *Black. Rep.* 1327. The court refused a new trial.

It is seldom granted but upon payment of costs, unless the judge specially, at *nisi prius*, orders it to be moved for; but it is discretionary in the court.

If the cause be tried before a judge of another court, it is said, an affidavit of what passed at the trial must be produced, as a necessary foundation for this motion, *Barnes* 447.; but now the judge sends his report to the court.

It is a rule to shew cause, and notice of such motion must be given; because the rule must be, "And that all proceedings in the mean time be staid." Give your former brief to a serjeant to move; draw up rule at secondaries, serve copy, and shew the original; speak to the clerk of the judge who tried the cause, for his report, who will (if of another court) send it to the puisne judge; if of the same court, he will, on its being called on for argument, report it to the court; and if he declares himself satisfied with the verdict, it hath been usual not to grant it on account of its being a verdict against evidence: on the other hand, if he declares himself dissatisfied with the verdict, it is pretty much of course to grant it.

If the verdict is set aside, and a new trial granted, draw up rule at the secondaries, and

E e

and

How to proceed if the verdict be set aside.

New Trial.

and serve it; and if it be on payment of costs, an appointment must be taken from one of the prothonotaries on the rule; serve copy, attend the taxation of the costs; when taxed, they must be paid, as the rule is conditional. And note, the *nisi prius* record need not be ingrossed anew, but the *jurata* must be altered as to the return; and if the cause is not tried the same term, then it must be resealed, and paid for anew to the clerk of the treasury; and you must have a new *venire*, and *babeas corpora*, if not tried the same term; *aliter*, not.

Of Docketing and Carrying in the Rolls.

FORMERLY the rolls of *Easter* term were taken in and filed with the prothonotary on or before the first day of *Trinity* term; those of *Trinity* term on or before *Michaelmas* day; of *Michaelmas* term, at or before the 6th of *January*; and those of *Hilary*, four days before *Easter* day, *R. E.* 34. c. 2. But now, by indulgence, those of *Michaelmas* term are taken in and docketed in *Hilary* term, those of *Hilary*, in *Easter*, *Easter* in *Trinity* term, and of *Trinity* in *Michaelmas*; and will not in future be received after the end of the next term.

When to
docket rolls
now.

How to
docket them.

When you docket your rolls, take same to the prothonotaries, with the entries thereon complete, if you have signed final judgment; if not, as far as you have gone in

Of Docketing, &c.

in the cause; if the entry of the issue or demurrer be paid for before, you pay nothing, if not, *8 d. per sheet*; then the clerk will give you the docket roll to enter the causes. The form of the docket is,

<i>Not informed in debt.</i>		<i>Issue joined in case, on a plea</i>		<i>The form.</i>	
London, ff. West for	} Roll	<i>of non assumpsit.</i>			
Burton,		Middlesex. Same for	} Roll		
Packer for Taylor,		Doe,		117	
	114	Same for Roe,			
<i>Says nothing in case.</i>		<i>Nul tiel record in case.</i>			
Middlesex, ff. Under-	} 115	London. Same for	} 118		
wood for Denn,		Doe,			
Lee for Fenn,		Same for Roe,			
<i>Judgment by default in case.</i>					
Middlesex, ff. Same	} 116				
for Doe,					
Same for Roe,					

By the 4 & 5 W. & M. c. 20. s. 2. No judgment not docketed and entered in the books shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors, and administrators, in their administration of their ancestors, testators, or intestate's estates. No judgment to affect lands, unless docketed.

Postea.

AS the associate, or clerk of assize, indorses the *postea* in this court, it is almost needless to insert precedents for that purpose; but just to give the young clerk a good idea of the steps taken after the trial, I shall here insert a few forms.

Notes for the
plaintiff, on
non assumpfit.

Notes.

Afterwards, that is to say, on the day, in the year, and at the place within mentioned, before *Alexander Lord Loughborough*, the chief justice within written, came the within-named *C. D.* by his attorney within contained, and the within-named *E. F.* although solemnly required, came not, but made default; therefore let the jurors of that jury within mentioned be taken against him by his default; and the jurors of that jury being summoned, came, who, to say the truth of the within contents being chosen, tried, and sworn, say upon their oath, That the within-named *E. F.* did undertake and promise, in manner and form as the within-named *C. D.* hath within complained against him; and they assess the damages of the said *C. D.* by occasion of the not performing the within-mentioned promises and undertakings, over and above his costs and charges, by him about his suit in this behalf expended, to 20*l.* and for those costs and charges to 40*s.* Therefore, &c.

For the de-
fendant.

As before, upon their oath, say, That the within-named *E. F.* did not undertake and promise, in manner and form as the said *E. F.* hath within in pleading alledged. Therefore, &c.

Upon a non-
suit.

Afterwards, that is to say, on the day, in the year, and at the place within mentioned, came as well the within-named *E. A.* by his attorney within mentioned, as the within-named *A. C.* by his attorney within named, before *Alexander Lord Loughborough*, the chief justice also within named, and the jurors of the jury whereof mention

is

of the said plaintiff, and by the command of the said chief justice (if in London or Middlesex), if at the assizes (by command of the said justices), are now newly set down, whose names are affixed in the within written panel, according to the form of the statute in that case made and provided, which said jurors so newly set down (that is to say), K. L. of, &c. haberdasher [naming the rest of the talefmen] being required came, who to declare the truth of the within contents, &c. as before.

For more precedents of this sort, see my *Instr. Cler. K. B.* p. 242.

Posse may be amended.

Posse may be amended by the judge's notes, and according to the truth of the verdict. *Rep. & Cas. C. P.* 118. 2 *Barnes, Notes* 354.

Continuance on the Roll after Cause tried.

IF your cause is not tried the same term the issue is delivered, the *venue* must be continued on the roll, by *vicecomes non misit breve*; as supposing an issue joined in *Easter term*, and the cause not tried till *Trinity*; then after the award of the first *venue*, which is returnable in *Easter term*, and also after the words, *because as well, &c.* being the last in the issue; add these words, *At which day come here the parties aforesaid, by their attorneys aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereupon; therefore,*

Continuance on the Roll. &c.

as before, the sheriff is commanded, that he
 cause to come here on the morrow of the
Holy Trinity, twelve, &c. by whom, &c. and
 who neither, &c. because as well, &c. At
 which day the jury, between the said parties
 of the plea aforesaid, was respited here, until
 on the morrow of *All Souls* then next follow-
 ing, unless * our Lord the King's justices
 assigned to take the assizes in the county
 aforesaid, by form of the statute, &c. should
 first come on *Wednesday* the 10th day of *July*,
 at *Oxford*, in the said county; and now here
 at this day cometh the said *A.* by his said at-
 torney, and the said † justices before whom,
 &c. have sent here *their* record in these
 words: Afterwards (*to the end of the Postea*).
 Therefore it is considered that the said *A.* re-
 cover against the said *C.* his said damages by
 the said jury in form aforesaid assessed, and
 also 23*l.* for his costs and charges by the
 court here adjudged to the said *A.* by his
 assent, which damages in the whole amount
 to 100*l.* and that the said *C.* be in mercy,
 &c.

* Alexander
 Lord Lough-
 borough, the
 chief justice of
 our said court
 of Common
 Bench, should
 first come on,
 &c.

† Ch. justice.

his

Judgment.

To the end of the issue. At which day the
 jury between the parties aforesaid, of the plea
 aforesaid, was respited here until on the mor-
 row of *All Souls* then next following, unless
 our Lord the King's justices assigned to take
 the assizes in the county aforesaid by form of
 the statute, &c. should first come on *Wed-
 nesday* the 10th of *July*, at *Oxford*, in the
 county aforesaid; And now here at this day
 cometh the said *A.* by his said attorney, and
 the said justices, before whom, &c. have
 sent here their record in these words: After-

Continuance on the Roll, &c.

Judgment.

Signed 10th
Nov. 1783.

wards (to the end of the *postea* verbatim). Therefore it is considered, that the said *A.* take nothing by his said writ against the said *C.* but be in mercy for his false suit therein, and that the said *A.* go thereof without day, &c. It is also considered, that the said *C.* recover against the said *A.* his damages by occasion of the premises to 22*l.* by discretion of the justices here, to the said *C.* at his request, for his costs and charges by him in this behalf sustained, according to the form of the statute, &c. by the court here adjudged, &c.

Judgment by Default.

IF the defendant does not plead within the time allowed by the rules of the court, or confesses the action, the plaintiff may sign judgment against him by default; and this judgment is either *interlocutory* or *final*. *Interlocutory* judgments are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is the province of a jury. Therefore, if the action be in *case*, *trespass* or the like (and where it only sounds in damages), the judgment is *interlocutory*, and there must be a writ of inquiry issued, directed to the sheriff of the county where the action is laid, to enquire by a jury what damages the plaintiff hath sustained, who is to return the inquisition to the court; whereupon the plaintiff's attorney taxes his costs, and signs final judgment: but if the plaintiff declares in debt,

debt, as on bond for a sum certain, or in any action wherein the specific thing sued for is recovered, the judgment is *absolutely complete*, which is called a *final judgment*.

If you sign an interlocutory judgment, make an *incipitur* of the declaration on a treble penny stamp paper, and also warrants of attorney, on a piece of parchment unstamped; file them with the clerk of the warrants, No. 3. *Pump Court, Temple*; pay in debt, trespass, and detinue, 4d. each; in other actions 8d. each; he will mark the judgment-paper, then carry it with the draft of the declaration to the prothonotaries office, the clerk will sign judgment; pay him 2s. if the declaration be of the same term (and has been filed); if not, 8d. *per sheet* for declaration; and if judgment be not of the same term with the declaration, then pay for the entry of the declaration 8d. *per sheet* anew, judgment, 2s.

How to sign
interlocutory
judgment.

If the action is in debt, then you enter an *incipitur* of the declaration on a double half-crown stamp paper, and file warrants of attorney as before; and after it is signed, you may get one of the prothonotaries to tax costs, and immediately take out execution. If the plaintiff takes a confession of the damages, the judgment is final.

How if in
debt.

The form of the warrants of attorney are already given, which will serve for these judgments. *Vide title issue*.

Though judgment be irregular, motion to set it aside must be made two days before the day appointed for executing the writ of inquiry, *Barnes* 256, or it will not be granted.

If the judgment
is irregular,
motion to set
it aside must
be made two

But be made two

Judgment by Default.

days before
the execution
of inquiry.

If in notice
of declara-
tion, two days
before in-
quiry.

A regular in-
terlocutory
judgment
may be set
aside, if de-
fendant has
merits.

If judgment
signed irre-
gularly, how
to proceed.

But if the irregularity be in the notice sub-
scribed to the copy of the process, the mo-
tion must be made before judgment signed.
Ibid. If in the notice of † declaration, two
days before the time appointed for the exe-
cution of the writ of inquiry. *Ibid.*

A regular interlocutory judgment may be
set aside, so as to let in the defendant to try
the merits of his case ; but it must be on
payment of costs, and such merits likewise
must appear upon an affidavit, *Barnes*, 242. ;
and it must be upon terms of taking short
notice of trial, &c. *Ibid.* A writ of inquiry
may be set aside, and defendant let in to
plead a fair plea on payment of costs ; but as
the rule is conditional, take care to pay them.

In these cases there must be notice of the
motion, and an affidavit of the service, as
your notice will be “ *in the mean time that the
proceedings be staid.*”

In the copy of process, the rule is, that
defendant has to appear *eight days, exclusive of
the return day* of the writ, *Barnes* 245. and
judgment signed before, will be irregular.

If the plaintiff signs an interlocutory judg-
ment irregularly, the court will set it aside
upon an affidavit of the facts, in which you
may shew “ *the writ having issued and return,*
“ *the delivery of the declaration, and the time*
“ *when the rule to plead expired ; or if you were*
“ *upon terms of accommodation, shew the special*
“ *matter, and the advantage taken,*” and there
will be no need in this case of a notice of mo-
tion, as it is a rule to shew cause, and plaintiff
proceeds at his peril.

After

Judgment by Default.

After interlocutory judgment and writ of enquiry awarded, the plaintiff became a bankrupt, and afterwards the enquiry was executed in his own name, and held good without a *scire facias* sued out by the assignees. 2 Wils. 358.

After writ of enquiry executed, a fatal mistake was found in the declaration: On which it was moved, that the interlocutory judgment might be forthwith entered upon record, agreeable to the declaration delivered, and the roll be brought into the proper office, and that the defendant might have four days to move in arrest of judgment.

Afterwards, on shewing cause, it appeared that defendant attended the execution of the inquiry by counsel, and cross-examined the plaintiff's witnesses, *per cur.* We lament, that entries on the roll are not made at the times when they ought to be made; the rule cannot be discharged, because defendant did not rely on the mistake, but has made a defence on the executing the writ of inquiry.

~~*Freeland v. Hunt, G. B. 2 Wils. 380.*~~

~~Rule to shew cause, why inquiry and in-~~
~~quisition should not be set aside for two ob-~~
~~jections: 1. That the notice was served on the~~
~~defendant himself, and not his attorney; 2. That~~
~~the time appointed by the notice for execut-~~
~~ing the inquiry was between the hours of ten~~
~~and five. It was admitted that both objec-~~
~~tions were good; but it was insisted that~~
~~both of them were cured, by one R. an at-~~
~~torney, attending at the execution on the~~
~~part of the defendant, cross-examining wit-~~
~~nesses,~~

If defendant becomes bankrupt after the judgment.

After defence made on enquiry, the defendant not allowed to take advantage of a mistake in the declaration.

Court will not set aside an enquiry, if an attorney attends on the part of the defendant.

Judgment by Default.

nesses, and producing a witness for defendant. *Barnes 233.*

If set aside,
must be a new
ingrossment.

If the writ of inquiry be set aside for irregularity, there must be a new writ ingrossed; and a writ of inquiry, executed on the day of the return, is good, unless it happen on a Sunday.

After judgment is signed, how to proceed.

When the interlocutory judgment is signed, give notice of executing the writ of inquiry, and if defendant lives within *forty miles of London*, and the *venue* be laid there, or in *Middlesex*, the notice must be given *eight days, exclusive of the day it is delivered*, *R. M. 1654.*; but if the defendant lives *above forty miles from London*, and the *venue* is laid there, or in *Middlesex*, then *fourteen days* notice, exclusive of the day, must be given, *ibid.*; and if the *venue* be laid in the country, then *ten days* exclusive is to be given; and *Sunday* is to be accounted as one, if it be not the day on which the notice is given, *Vide Stat. 14. Geo. 2. c. 17. s. 4.*; And if there hath been no proceedings for twelve months after judgment, there must be a term's notice of executing a writ of inquiry of damages; and such notice must be given before the *Effoign* day of the fifth or subsequent term, *Vide R. E. 13 Geo. 2.*; unless the cause has been staid by injunction; and a judge's summons, if no order made, not to be deemed a proceeding. *Vide the above rule.*

No proceed-
ings for 12
months.

Where the
plaintiff con-
cludes *ad patriam*, defend-
ant obliged
to accept of
notice of en-

That in every cause where the plaintiff concludes *ad patriam*, and giveth notice of trial on the back of his pleadings, pursuant to rule, *Trin. 2 Geo. 1.*; if the defendant doth not join issue, on such pleading before the

Judgment by Default.

the rule be out, that in every such case, after judgment obtained, the defendant's attorney shall be obliged to accept notice of executing a writ of inquiry, from the time that notice of trial was given, on the back of such pleading. R. Hil. 6 Geo. 1.

That in all cases where the defendant demurs to the plaintiff's declaration, the defendant's attorney shall be obliged to accept of notice of executing the writ of inquiry on the back of the joinder in demurrer; and in case where the defendant pleads such a dilatory plea, that the plaintiff is obliged to demur to, that in such a case the defendant's attorney shall be obliged to accept of notice of executing a writ of inquiry on the back of such demurrer. *Tr. 10 Geo. 1.*

Notice of inquiry given to a defendant when his attorney is known, is not good notice, but when his attorney is not known, then the notice may be given to the defendant, *Barnes* 300. 306, 307., or at least left at defendant's house, and not in the office.

Pract Reg. 126.

Upon an issue of *nul tiel record*, notice of executing a writ of inquiry of damages may be given upon the issue book, as well as upon a joinder in demurrer. *Barnes* 176.

Where plaintiff has appeared for the defendant according to the statute, left a declaration in the office, and given him a proper notice thereof, and signed judgment for want of a plea, he may give notice of executing a writ of inquiry, either by delivering the notice in writing to defendant, or leaving the same at his last or most usual place

If defendant demur to declaration, he shall accept of notice of inquiry on the back of joinder; or where the plaintiff is obliged to demur to defendant's plea, taken on back of such demurrer.

Notice to defendant when known not good, aliter if not.

Upon an issue of nul tiel record, notice may be given upon the issue book. If the plaintiff enter an appearance according to the statute, and sign judgment, he may give notice of executing inquiry by leaving same at his last or most usual place.

Judgment by Default.

at defendant's place of abode, which shall be sufficient
last place of notice to such defendant. *R. M. Geo. 2.*
abode.

The notice of executing a writ of inquiry should be confined to two hours, *Pract. Reg. 445. Cas. Pract. C. B. 113. Barnes 213. 221.*; and it must be certain as to place, *Barnes 218*; and in a joint action to be given to both defendants, *Pract. Reg. 443.*

Inquiry.

Notice of inquiry for London.

TAKE notice, that a writ of inquiry of damages in this cause will be executed on *Friday* the 14th day of *November* instant, between the hours of ten and twelve of the clock in the forenoon of the same day, at the *Guildhall* of the city of *London*. Dated this 6th day of *November*, 1783.

Yours, &c.

To Mr. C. D. attorney for J. K. plaintiff's attorney,
the above defendant. *Inner Temple lane.*

Middlesex.

If it be in *Middlesex*, and in *Term time*, say, "at the *Guildhall* in *King-street*, *Westminster*, in the county of *Middlesex*;" if in vacation, "at the *Sheriff's office* in *Took's-court*, *Curfitor-street*, *Chancery-lane*, in the county of *Middlesex*."

County.

It in the country, "will be executed on, &c. and at the house of L. W. commonly called or known by the name or sign of the *Blue Boar*, in *Oxford*, in the said county." If no attorney appear for the defendant, then direct your notice to him, and leaving at his house will be sufficient.

If

Inquiry.

If you do not intend executing the inquiry ^{Counter-} on the day, you may countermand same, by ^{mand.} giving notice two days exclusive before the day of executing, if in town, and defendant lives within forty miles of *London*, but if he lives above forty miles, then six days notice of countermand, at least, by *Stat.* 14 *Geo. 2. c. 17.*

A notice of inquiry may be continued ^{Con tinuance} over to another day, but not more than once in a term, *Barnes* 292., and two days notice be given, *Barnes* 297.; so upon short notice, *Pract. Reg.* 444. *Barnes* 301., short notice should be at least as much as is sufficient to countermand a notice, viz *two days. Ibid.*

I do hereby countermand the notice of ^{Notice of} executing the writ of inquiry of damages ^{countermand.} given you in this cause. Dated, &c. yours, &c.

I do hereby continue the notice of exe- ^{Notice of} cuting the writ of inquiry given you in this ^{continuance} cause, to *Monday* the 17th day of *November* instant, when the same will be executed at the *Guildhall* of the city of *London*, between the hours of ten and twelve of the clock in the forenoon of the same day. Dated, &c. yours, &c.

Costs may be recovered from the plain- ^{Costs for not} tiff for not executing his writ of inquiry, in ^{exe cuting} the same manner as a defendant by the court ^{visits of in-} of the court is now intitled to costs for not ^{quarry.} proceeding to trial of an issue joined after notice given. *Rule Trin* 13 *Geo. 2.*

Notice of inquiry given in the country, ^{Notice in the} and not to the agent who received the decli- ^{country, and} ration in term, held good. *Barnes* 305. ^{to the} ^{town,} ^{the}

Irregularity
of notice
cured by mak-
ing a defence
Writ of in-
quiry.

Irregularity of notice of inquiry is cured by making defence on executing the writ. 2 *Barnes* 245.

George the Third, by the grace of *God*, of *Great Britain, France, and Ireland*, King, defender of the faith, &c. To the Sheriff of *Middlesex*, Greeting, Whereas *Richard Fenn*, late of in your county, gentleman, was attached to be in our court, before our justices at *Westminster*, to answer *John Denn* in a plea, *For that whereas* (to the end of the declaration) to the damage of the said *John* of 20*l.* as he saith; and it was in such manner proceeded in our court, that the said *John* ought to recover against the said *Richard* his damages, by occasion of the premises: But because it is unknown what damages the said *John* hath sustained by occasion of the premises aforesaid, We command you, That by the oath of twelve good and lawful men of your county*, you diligently inquire what damages the said *John* hath sustained, as well by reason of the premises, as for his costs and charges by him about his suit in this behalf expended, and the inquiry which you shall thereupon take, make appear to our justices at *Westminster*, on the morrow of *All Souls*, under your seal, and the seals of those by whose oath you shall take the said inquiry, and have there this writ. Witness, *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the twenty-third year of our reign.

This writ is to be ingrossed on a 2*s.* 6*d.* stamp parchment, and signed by the prothonotaries

* If in London, say bailwick.

Inquiry.



honotaries: if the writ is of the same term with the judgment, then pay 2s.; if not, 8d. per sheet, and 2s. signing, least 7d.; leave it at the sheriff's office *one day before the execution*, first indorsing on it the day and hour in which notice is given for its execution; pay in *London* 1l. 9s. 4d. if no witnesses, and 4d. for every witness; in *Middlesex*, 1l. 10s. 4d.; other counties, 1l. 11s. 6d. If the witnesses will not voluntarily attend at the execution of the inquiry, the party wanting their testimony may take out a *subpœna*, as follows; and which you may have at the stationer's, ready printed on a 2s. 6d. stamp.

New Rule,
Hl. 23 Geo. 3.
respect London and Middlesex only.

George the Third, &c. To *John Doe*, *Richard Roe*, *Samuel Ball*, and *Richard Iuz*,
We command you, and every of you, that setting aside all and singular businesses and excuses whatsoever, you, and every one of you, be and appear in your proper persons, before Sir Robert Taylor, Knight, and Benjamin Cole, Esquire, sheriff, of the county of *Middlesex*, on *Monday* the day of next, at the sheriff's office in *Tock's Court*, *Castle-yard*, in the county of *Middlesex*; if in *London*, say (Before Sir R. T. Knt. and B. C. Esqs. sheriffs of the city of *London*, at the *Guildhall of the said city*); if in the county, say (Before A. P. Esquire, sheriff of the county of *Oxford*, at the house of *William Long*, commonly called or known by the Name or Sign of the *Red Lion*, in *Oxford*, in the said county, on the day of next, by eleven of the clock in the fore-

Subpœna on inquiry.
Four may be put in one subpœna.

noon of the same day), there to testify the truth, according to your knowledge, in a certain cause now in our court of the Bench, depending between *John Denn*, plaintiff, and *Richard Fenn*, late of, &c. defendant, of a plea of trespass on the case (*as the nature of the action is*), on the part of the plaintiff, on which our certain writ of inquiry of damages has been sent by our said justices, out of our said court of the Bench, and directed to the said sheriff, then and there in due form of law to be executed before the said sheriff. And this you, nor any of you, shall in no wise omit, under penalty of, every of you, of 10*l.* Witness *Alexander Lord Loughborough*, at *Westminster*, the 5th day of *July*, in the twenty-third year of our reign.

Take same to the prothonotaries office, and sign it; pay 1*s.* seal 7*d.*; each witness must be served with a copy, and paid 1*s.* No *præcipe* is requisite for the office.

When inquiry
is returnable,
how to proceed.

When the inquiry is returnable, apply to the sheriff for same; then take it to the stamp office, and get the inquisition stamped with a double half-crown; and on the *quarto die post*, in the evening, go to the prothonotaries, and get the clerk to enter it; pay 5*s.* 4*d.* in case, in trespass 6*s.* 8*d.* more; then go to one of the prothonotaries, and he will tax the costs, and deliver over the inquisition to the clerk of the judgments, who will enter up final judgment; but as soon as the costs are taxed, you may take out execution, or arrest defendant for damages, if above 10*l.* with the costs included.

Proth. 5*s.* 4*d.*
Clerk of the
judg. 2*s.*

N. B.

Inquiry.

435

N. B. The defendant's attorney may have a rule to be present, if he thinks fit, upon applying to the secondary's office, pay 4s. and then plaintiff's attorney is bound to give notice of taxing.

Entry of Interlocutory Judgment.

N. B. The prothonotaries, at the time of signing the judgment, provide the roll for the entry, which is to be wrote in a fair hand, leaving a margin of an inch wide, and proper room at the top for the prels, which is marked with the prothonotaries names, then first enter the declaration thus:

Middlesex, (ss) Richard Roe, late of Westminster, in the said county, yeoman, was attached to answer John Doe, in a plea of trespass on the case, and whereupon the said John, by Samuel Underwood his attorney, complains, For that whereas (to the end of the declaration), suit, &c.

And the said Richard, in his proper person, comes and defends the wrong and injury when, &c. and says nothing in bar or preclusion of the said action of the said John, by which the said John remains therein undefended against the said Richard, for which the said John ought to recover against the said Richard his damages by occasion of the premises. But because it is unknown what damages the said John hath sustained by occasion thereof, Therefore it is com-

If defendant appear, p 1 the attorney's name.

This word may be used in all actions,

I f 2

manded

which saves
another pre-
cedent.

Continuance
and return of
the inquisi-
tion.

Judgment
signed the
day of
1783.

manded to the sheriff, that by the oath of twelve good and lawful men of the said county, he diligently inquire what damages the said *John* hath sustained, as well by occasion of the premises, as for his costs and charges by him about his suit in this behalf expended; and that the inquisition which he shall thereupon take, he make appear to the justices of our Lord the King at *Westminster*, on the morrow of *All Souls*, under his seal, and the seals of those by whose oath he shall make the said inquisition. At which day here cometh the said *John*, by his said attorney, and the sheriff, to wit, Sir *Robert Taylor*, Knight, and *Benjamin Cole*, Esquire, sheriff of the said county, now return here a certain inquisition, taken before him, at his office in *Took's Court, Curstons-street*, in the said county, on the day of in the twenty-third year of his present Majesty's reign, by the oath of twelve good and lawful men of his county, by which it is found, that the said *John* hath sustained damages, by occasion of the premises, besides his costs and charges by him laid out about his suit in this behalf, to 50*l.* 9*s.* 5*d.* and for those costs and charges to 20*s.* Therefore it is considered, that the said *John* recover against the said *Richard* his damages aforesaid to 51*l.* 9*s.* 5*d.* by the inquisition aforesaid, in form aforesaid found; and also 16*l.* 10*s.* 7*d.* to the said *John*, at his request, for his costs and charges aforesaid, by the court here of in-crease adjudged; which said damages, in the

the whole, amount to 68l.; and the said Richard, in mercy, &c.

Mercy.

In order to prevent the execution of a writ of inquiry, frequently the defendant (to save the costs), confesses the action, or the attorney does it for him, with a stay of execution, which confession is generally wrote in the margin of the declaration, or it may be done on the back of the inquiry, or on plain paper thus: "I confess this action; and that the plaintiff hath sustained damage to the amount of 20l. besides his costs and charges (to be taxed by one of the prothonotaries); and it is agreed, that no judgment shall be entered up, or execution issued, until the day of next, in default of payment of the said 20l.; and I do further agree, that no writ of error shall be brought, nor any bill in equity filed; and that in case the plaintiff shall enter up his judgment, he shall be at liberty to levy the said 20l. together with costs, sheriffs poundage, and all other fees. As witness my hand," &c.

If the confession be in an action of debt, then it may be, "I hereby confess the debt in this cause, and that the plaintiff hath sustained damage to the amount of 1s. besides his costs and charges to be taxed by one of the prothonotaries, and the debt is agreed to be paid as follows," &c. (here insert the days of payment), and then as above.

N. B. It is said the sheriff is not duly authorized by this agreement to levy the poundage and expences; therefore to avoid

contention, the better way will be to take the *cognovit* in double the amount of the debt, and give the defendant a defeazance separately, that upon payment of the real debt due with all costs of levy, &c. that he shall be discharged from the action.

If the judgment is to be forthwith entred up, then sign it upon a double 2s. 6d. stamp paper, with the prothonotaries, first making an *incipitur* of the declaration thereon, and filing warrants of attorney.

If your entry is already taken in, there needs no payment anew, but for signing the judgment, nor no new roll; pay 7s. 4d. and tax the costs.

Retraxit.

Retraxit.

IT is is very common after plea pleaded, to confess the action; or after issue delivered; in such case, you put in the confession, "the consent of the defendant to withdraw his plea," so that a *retraxit* may be entred. This is done by taking the judgment paper to Mr. Underwood, at the prothonotaries, who signs the judgment, and marks the *retraxit* thereon; pay 2s. *retraxit*, and for signing judgment as before. *N. B.* In this case, the attorney for the defendant need not be present, as in the King's Bench; file warrants of attorney, if not before done.

Of executing a Writ of Inquiry before the Chief Justice or Judge of Assize.

THERE are cases upon which application may be made to the court to have the writ of inquiry executed before the chief justice, at the sittings, or before the justices of assize; but leave is seldom granted, unless the case is very special; as where the law is mixed with the fact, or it appears to be of too much consequence for the sheriff to undertake, in which case the jury set their hands and seals to their verdict; and upon the trial, the judge of *nisi prius* is said to be only an assistant to the sheriff, and has no judicial power; and if the parties come to an agreement at the trial, the judge is to sign it, and afterwards the court may be moved to have it made a rule of court. 12 *Mud.* 519. 610. *Barnes* 135.

The way to apply is, to make affidavit How to apply. setting forth the circumstances of the parties, plaintiff and defendant, and the nature of the action, upon which the court will grant a rule to shew cause; and if made absolute, you may at same time move for sheriff to return a good *in* v.

The notice of inquiry before the chief Justice or judge of assize, ought to be for the sittings or assizes *generally*, and not for any particular day, *Barnes* 135; and notice for a particular day is void. It is said, the writ need not be entred with the marshal, not being

within the rule concerning records of *misprisus*, 2 *Barnes* 211.; but the practice now is to enter it with the marshal, and to pay 13s. 9d. as also the court fees.

In this court a common writ of inquiry is made out, and certainly is right, but in King's Bench the practice seems to be otherwise; but no entry of a special writ of inquiry is to be found in the book.

If the rule is made absolute, a *common writ of inquiry, directed to the sheriff*, is made out by the plaintiff's attorney, and the sheriff brings the writ into court, calls and swears the jury, &c.; and he also returns the inquisition as taken before him in the presence of the chief justice; and at the usual time call on the sheriff for the return of the inquisition, and tax the costs.

N. B. I saw one very lately in this court; but the inquisition was not returned under the hand and seal of the juron, but in common form. The sheriff's fee is as usual.

In the Common Pleas.

John Denn, Plaintiff,
and

Richard Fern, Defendant.

Affid. vit.

John Denn, of, &c. the plaintiff in the above cause, maketh oath and saith, That he this deponent was very early on *Sunday* morning of the 5th day of *January* last, wrongfully arrested and took into custody by *Richard Fern*, the above-named defendant; and was by the said defendant, and his assistants, inhumanly beaten and otherwise ill-treated, and had his cloaths very much torn by defendant, and his assistants, by dragging him through the streets, and was taken to, and detained in defendant's house for a long time, and was there threatened to be put in irons by

by defendant and his wife: And this deponent saith, That after being so ill-treated and detained for a long time, he was told by defendant, that he might go about his business, for that he was not the man defendant wanted; And this deponent saith, That he told said defendant immediately, upon his being first accosted by him, that his name was *John Dunn*, and did every thing in his power to convince said defendant that he was not the man against whom the defendant had a warrant, namely, one *R. F.* but to no purpose: And this deponent saith, That an action was commenced, and is still depending against the said defendant for the before-mentioned trespass, assault, and false imprisonment, and that the said defendant hath suffered judgment to be entred against him by default, in the said cause: And this deponent further saith, That he is fearful if a writ of inquiry of damages in the above cause should be executed before the sheriff of *Middlesex*, that he this deponent shall not have an impartial assessment of damages, as the said defendant hath long been an officer to the said sheriff of *Middlesex*: and as this deponent is informed, and verily believes, is well acquainted with the set of men who generally attend as jurymen to assess the damages upon writs of inquiry before the said sheriff; And therefore this deponent saith, That for the sake of a fair and impartial assessment of damages, in the above cause, he wishes for leave to execute his said writ of inquiry before the chief justice of this honourable court,

Dunn

Rule to shew
cause.

Dena v. I n r

Tuesday the

day of Upon reading the affidavit of the plaintiff, *It is ordered*, That the defendant, upon notice of this rule to be given to his attorney or agent, shall shew cause to this court to-morrow pre-emptorily, before the rising of the court (otherwise this rule shall be then absolute), why the writ of inquiry of damages in this cause, should not be executed before the fifth of the county of *Middlesex*, at the sitting or *nisi prius* to be held for that county, after this present term, in the presence of the said chief justice, or one other of the justice of this court, by a good jury, to be impanelled, returned, and sworn by the said sheriff, &c. 7s.

Affidavit of
service of the
rule

J. M. clerk to C. G. of, &c. gentleman, maketh oath and saith, That he this deponent did, about four of the clock of the day of the date hercof, leave a true copy of the rule hereto annexed, at the office of Mr. H. who acts as attorney or agent for the above-named defendant, with the clerk of the said Mr. H., and did also at the same time leave therewith an examined copy of the affidavit made by the above plaintiff, on his obtaining the said rule, dated the day of 1783. And this deponent saith, That at the time of the service of such rule, he this deponent shewed unto the said clerk of the said Mr. H. the said original rule hereunto annexed.

Notice of in-
quiry.

Take notice, That a writ of inquiry of damages in this cause will be executed at the sittings after this present *Trinity* term, to be

held at *Westminster-hall*, in the county of *Middlesex*. Dated, &c. your's, &c.

Evidence on Inquiry.

Upon a judgment by default in an action upon a promissory note, or a bill of exchange, the sum due thereon is admitted, and need not be proved upon the execution of a writ of inquiry, *per Gould Just. 2 Wils. 155.*; but it shall be produced, to see if any money is paid off. *Str. 1149.*

A note or bill need only to be produced to the sheriff

If there be judgment by default or confession, and the certainty of the demand appears upon record, the court may assess damages without awarding a writ of inquiry. *2 Saund. 107.* And though the defendant will not consent to it, it does not signify if the plaintiff consents. *Ibid.*

Upon the execution of an inquiry, the jury may give interest on note, bill of exchange, and money lent, and on an account stated, and also on notes payable on demand, after it is made. *2 Black. Rep. 761. Barnes 228.*

If an action is brought on a policy of insurance, or in covenant upon a lease, or other deed, there needs no evidence of the execution.

The plaintiff in trespass for taking his goods, need not prove property in him, but the value only. *Yelv. 152. Dal. 9.*

The defendant shall not give evidence of fraud in the plaintiff, for he has admitted the contract to be as plaintiff has declared. *Str. 612.*

Just.

Judgment on a Warrant of Attorney.

IT happens frequently, that after the defendant is arrested, the plaintiff, in order to prevent expence, accepts a warrant of attorney for his demand, with a defeazance, payable by installments; if it does so happen, and the defendant is in custody, the following rule must be observed.

How warrants of attorney to acknowledge judgment must be taken of prisoners. “ That no bailiff or sheriff’s officer shall presume to exact or take from any person, being in his custody by arrest, any warrant to acknowledge a judgment but in the presence of an attorney for the defendant; which attorney shall then subscribe his name thereunto; which said warrant shall be produced when the said judgment shall be acknowledged; and if any bailiff or sheriff’s officer shall hereafter offend or do contrarywise, she shall be severely punished for so doing.” *R. H. 14 & 15 Car. 2.*

No attorney shall enter any judgment gotten from any defendant other than as aforesaid. “ That no attorney shall from henceforth acknowledge, or enter, or cause to be acknowledged or entered, any judgment by colour of any warrant gotten from any defendant being under arrest, otherwise than as aforesaid.” *Ibid.*

Warrants of attorney for confessing judgment to be read to the jury. “ To prevent frauds and impositions in the execution of warrants of attorney for confessing of judgments in this court, “ *It is ordered*, That from and after the first day of this *Michaelmas* term, every such warrant of

“ of attorney shall be read over by the per-
 “ son who is to execute the same, or by
 “ some other person to him, before the exe-
 “ cution thereof, and that if judgment shall
 “ be entred up upon any such warrant of
 “ attorney, which shall be executed the first
 “ day of *Michaelmas* term, and which shall
 “ not be so read over as aforesaid, such
 “ judgment, upon motion, may be set aside
 “ as irregular.” *R. T. 14 & 15 G. 2.*

But if the defendant himself be an attor-
 ney, or practises as such, it is sufficient,
 though no attorney on his behalf be present.
Barnes 37.

It is not necessary that a warrant of attor- In presence of
 torney to confess a judgment in this court, ^{an attorney or}
 given by a person in custody, be executed in ^{King's Bench}
 the presence of an attorney of this court, if it ^{justices}
 be in the presence of an attorney of the *King's*
Bench, it is sufficient. *Barnes 44*

November 16th, 1750, ' Declared by all W. en by a
 “ the judges in the Treasury Chamber, that ^{the judges}
 “ if a warrant of attorney to enter judgment ^{judgment}
 “ be above a year old, and under ten years ^{may be en-}
 “ old, leave to enter judgment may be ^{tered on an}
 “ given by a treasury rule, but if the war- ^{old warrant of}
 “ rant be above ten years old, the court must ^{attorney.}
 “ be moved for leave to enter judgment.” —
 If the warrant of a attorney be under twenty
 years old, the common affidavit of the due
 execution of the warrant, that the debt is
 unpaid, and the parties living, is sufficient
 for an absolute rule, but if the above war-
 rant be above twenty years old, the rule must
 be to shew cause, and served on defendant
Barnes 47.

Motion

Judgment entered on an old warrant of attorney on affidavit of defendants being alive in Jamaica four months before.

Motion for leave to enter judgment on a warrant of attorney after a year, It was sworn that defendant was living in *Jamaica*, and in good health, and had been conversed with by the deponent the 13th of *September* last, and that the deponent sailed from thence the 17th of last month, and arrived in *London* the 15th of *January* following: Leave granted, plaintiff having applied as soon as he well could. *Barnes* 256.

Pl. intiff a lunatick, affidavit of the person who received the interest sufficient.

On motion to enter up judgment on an old warrant of attorney, plaintiff being a lunatick, did not swear the money unpaid; but another did, who had received the interest upon the bond for three years, ever since the plaintiff was lunatick. Judgment entered. *Barnes* 42.

Action to enter up judgment, the warrant not expressing any term.

Motion in treasury for leave to enter judgment on an old warrant of attorney, not expressing any term or time, and granted, no cause being shewn to the contrary. *Barnes* 52.

Defendant died before the judgment entered, held good. Entered the day after death of defendant, held good.

Defendant died before judgment was signed; but after the first day of the term in which it was signed, and held good, because all judgments are from the first day of the term of which they are signed. *Ibid.* 11. Judgment on warrant of attorney, signed the day after defendant's death, ruled to be set aside. *Barnes* 2, 3.

Warrant to enter judgment at the suit of two, motion to enter judgment at the suit of the survivor.

Defendant gave a warrant of attorney to enter judgment at the suit of plaintiff, *John Still* and *Sujunab* till deceased. The judges in the Treasury gave leave to enter judgment at the surviving plaintiff's suit, upon his affidavit of the due execution of the war-

rant

rant of attorney, and that the debt was unpaid, and the defendant alive. *Barnes* 48.

53.

Leave to enter up judgment at the suit of an executor on an old warrant of attorney; the words whereof extended to enter judgment at the suit of testator, *his heirs, executors, or administrators*, *Barnes* 44, but not if these words are left out. Leave given to enter at the suit of an executor on warrant

Leave granted to enter judgment on an old warrant of attorney in *Andaelmas* term, on affidavit that defendant was living in *Ireland* on the 18th of *September* preceding, as a reasonable length of time for distance. *Barnes*

54.

If the warrant of attorney is given to a feme sole, and she marries before judgment is entered up, application must be made for leave to enter it up by the husband and wife, founded upon an affidavit proving their marriage. *How to enter it up, if given to a feme sole, who afterwards marries.* *Vide 3 Bar 141.*

If the judgment is to be entered up in term, make the following affidavit, in gross, on a treble sixpenny stamp paper, and swear same before a judge. How term to be entered up.

In the Common Pleas.

John Denn, Plaintiff,
and

Richard Fenn, Defendant. *Affidavit.*

John Denn, of *Leet-street*, *London*, hosier, the above named plaintiff, and *Richard Budd*, of the same place, yeoman, severally make oath and say, And first this deponent *John Denn* for himself saith, That the above-named defendant *Richard Fenn* being justly indebted

unto

unto this deponent, in the sum of twenty pounds, for goods sold and delivered, and work done (here set forth the consideration), did, in order to secure unto him this deponent the same, execute unto this deponent the warrant of attorney hereto annexed, And this deponent further saith, That the whole of the said twenty pounds is now justly due and owing unto him this deponent, and that he verily believes the said *Richard Fenn* is now living, he this deponent having seen, and conversed with him two days since, and this deponent *Richard Budd* for himself saith, That he was present, and did see the said warrant of attorney executed by the said defendant, and that the name *Richard Fenn*, set and subscribed at the foot thereof, is of the proper hand-writing of the said *Richard Fenn*, and that he did sign, seal, and as his act and deed deliver the same, in the presence of this deponent, and that the name *R. Budd* set and subscribed as the witness to the said warrant of attorney, is of the proper hand-writing of this deponent.

Before the judges go into court, speak to one of the secondaries, who will take you into the Treasury-chamber, where you will move upon this affidavit for leave to enter up the judgment, which will be granted of course, in the evening draw up the rule at the secondaries; pay 1s. and sign judgment.

In vacation.

If in vacation, take the affidavit to a judge, who will grant an order for that purpose, pay 4s., prepare on a slip of parchment warrants of attorney for the plaintiff and defendant thus, mentioning the term.

Middl sex,

Middlesex, to wit, *John Denn* puts in his place *S. U.* his attorney, against *Richard Fenn*, late of *Westminster*, in the said county, hofier, in a plea of debt.

Middlesex, (ff.) The said *Richard Fenn* puts in his place *J. B.* his attorney, at the suit of the said *John Denn*, in the plea aforesaid.

Then prepare judgment, which is done by entering an *incipitur* of the declaration, on a double half-crown stamp paper; take the warrants of attorney to the clerk of the warrants, who will sign the judgment paper (annex the rule thereto), pay 8*d.*; go to the prothonotaries office, and the clerk will sign the judgment, and tax the costs; pay signing, 5*s.* 4*d.*; after this take out execution.

Middlesex, (ff.) *Rubard Fenn*, late of *West-* Declaration
minster, in the said county, hofier, was sum- a d judgment
moned to answer *John Denn* in a plea, That by nil dicir,
he render to the said *John* forty pounds of a cert red on
lawful money of *Great Britain*, which he owes the roll.
to, and unjustly detains from him; and there-
upon the said *John*, by *S. U.* his attorney,
complains, *That whereas* the said *Ri bard*, on
the day of in the year of our the date of
Lord 1783, to wit, at *Westminster*, in the t 12 W. II. c. 11
said county, borrowed of the said *John* the
said forty pounds above demanded, to be
paid to the said *John* when he the said *Rich-*
ard should be thereto afterwards requested;
yet the said *Richard* (although often request-
ed, &c.) hath not yet paid the said forty
pounds above demanded, or any part there-
of, to the said *John*, but he to pay the same,

or any part thereof, to the said *John*, hath hitherto wholly refused, and still refuses; wherefore the said *John* saith he is injured, and hath sustained damage to the value of ten pounds, and therefore he brings his suit, &c.

Judgment by
nil dicit.

And the said *Richard*, by *Joseph Bruce*, his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John*, by which the said *John* remains therein undefended against the said *Richard*; Therefore it is considered, That the said *John* recover against the said *Richard* his said debt, and also 63s. for his damages, by occasion of the detaining the said debt by the court here adjudged to the said *John* by his assent; and the said *Richard*, in mercy, &c.

Judgment
signed the
11-th Novem-
ber, 1763.

Mercy.

If by non sum
informatus.

To the end of declaration; And the said *Richard*, by *Joseph Bruce* his attorney, comes and defends the wrong, and injury, when, &c.; and the same attorney of the said *Richard* says, That he is not informed by the said *Richard* of any answer to be given for the said *Richard* in the premises, nor doth he say any thing in bar or preclusion of the said action of the said *John*, by which the said *John* remains therein undefended against the said *Richard*: Therefore it is considered, That the said *John* recover against the said *Richard* (exactly, as in the other judgment).

But if the defendant gives a bond with a warrant of attorney, then your affidavit will vary, and must be thus.

In the Common Pleas.

J. G. Plaintiff,

and

C. D. Defendant.

J. G. of, &c. the above-named plaintiff, and J. P. of, &c. Gentlemen, severally make oath and say, And first this deponent J. G. for himself saith, That the above defendant and stands justly indebted unto him this deponent, in the sum of 200*l.* upon and by virtue of a certain bond or obligation, bearing date the 21st day of *January* last past, entered into by the said defendant to this deponent in the penal sum of 400*l.* conditioned for making void the same on payment of the sum of 200*l.* and interest for the same, after the rate of 5*l.* *per cent. per annum*, on the 6th day of *July* last past, and also the sum of — for interest thereof; And for the better securing to this deponent the payment thereof, the said C. D. did, on the same day and year, enter into and duly execute the warrant of attorney hereto annexed; And this deponent further saith, That he verily believes the said defendant is now living, he this deponent having seen and convers'd with him two days since: And this deponent J. P. for himself saith, That he was present, and did see the warrant of attorney hereto annexed, duly executed by the said defendant, and that the name C. D. set and subscribed at the foot thereof, is of the proper handwriting of the said defendant C. D. and that he did sign, seal, and as his act and deed deliver the same, in the presence of this deponent; and that the name J. P. set and sub-

Affidavit of
mouey being
due on bond,
and of the
execut on of
warrant of at-
torney.

Judgment, &c.

scribed as the witness thereto, is of the proper hand-writing of this deponent. If you enter up judgment on a bond and warrant of attorney, declare on the bond only, and enter up the judgment thus :

Judgment by
confession in
debt on Lond

And the said C. D. by J. K. his attorney, comes and defends the wrong and injury when, &c. and says, That he cannot deny the said action of the said J. G. nor but that the said writing obligatory is the deed of him the said C. nor but that he owes to the said J. the said 400*l.* in manner and form as the said J. hath above declared against him : *It is therefore confessed*, That the said J. recover against the said C. his said debt, and also 63*s.* for his damages, which he hath sustained as well by occasion of the default thereof, as for his costs and charges by him about his suit in this behalf expended, adjudged by the court here to the said J. by his assent, and the said B. in mercy, &c.

Judgments
signed the
day of
1783.

Mercy.

Judgments.

FOR a judgment by *nil dicit* in debt, or *non sit informatus*, see title *judgment on Warrant of Attorney*. p. 450.

Judgment by
cognovit ac
cessionem in cas.

And the said Richard, by J. T. his attorney, comes and defends the wrong and injury, when, &c. and says, That he cannot deny the said action of the said John, nor but that he did undertake and promise, in manner and form as the said John hath above thereof complained against him; nor but that the said John hath sustained damages, by occasion

caſion of the nonperformance of the ſaid ſeveral promiſes and undertakings, to 20*l.* as he the ſaid *John* hath above in his ſaid declaration ſuppoſed; and hereupon the ſaid *John* prays, That the ſaid damages ſo acknowledged, together with his expences and coſts, laid out by him about his ſuit in this behalf, may be adjudged to him, &c. *Therefore it is conſidered,* That the ſaid *John* recover againſt the ſaid *Richard* his damages aforeſaid, ſo by him in form aforeſaid acknowledged, and alſo 10*l.* for his coſts and charges by the court here adjudged to the ſaid *John*, by his aſſent, which ſaid damages, in the whole, amount to 30*l.* and the ſaid *Richard*, in mercy, &c.

Judgment
given 10th
Nov. 1783.

And the ſaid *C.* by *J. K.* her attorney, comes and defends the wrong and injury, when, &c. and ſays, That ſhe cannot deny the ſaid action of the ſaid *A.* nor but that the ſaid bond is the deed of the ſaid *H.* nor but that ſhe the ſaid *C.* adminiſtratrix as aforeſaid, detains from the ſaid *A.* the ſaid 100*l.* in manner and form as the ſaid *A.* hath above complained againſt her; *Therefore it is conſidered,* That the ſaid *A.* recover againſt the ſaid *C.* adminiſtratrix as aforeſaid, his ſaid debt, and alſo 6*l.* 10*s.* for his damages which he hath ſuſtained, as well by occaſion of the detaining the ſaid debt, as for his coſts and charges by him about his ſuit in this behalf expended, adjudged to the ſaid *A.* by his aſſent, to be levied of the goods and chattels which were of the ſaid *H.* at the time of his death in her hands to be adminiſtered, if ſhe hath ſo much

Mer. v.

The like
againſt an
adminiſtrator
in debt.

Judgment
given 10th
Nov. 1783.

thereof; and if she hath not so much thereof in her hands to be administered, then the said 6*l.* 10*s.* being the damages, costs, and charges aforesaid, to be levied of the proper goods and chattels of the said C.; and the said C. in mercy, &c.

Mercy.

The like
judgment in
case.

And the said C. by ~~X~~ K. her attorney, comes and defends the wrong and injury, when, &c. and says, That she cannot deny the said action of the said A. nor but that the said F. in his life-time, did undertake, and promise, in manner and form as the said A. hath above thereof complained against him, nor but that the said A. hath sustained damages by reason of the not performing the said promises and undertakings to 2*5* *l.* as the said A. hath above supposed; and upon this the said A. prays judgment, and his damages so acknowledged, together with his costs and charges by him about his suit in this behalf expended to be adjudged to him, &c. *Therefore it is considered,* That the said A. recover against the said C. administratrix as aforesaid, his said damages, so above acknowledged, and also 6*l.* 10*s.* for his costs and charges by him laid out about his suit in this behalf, adjudged to the said A. by his assent, to be levied of the goods and chattels which were of the said F. at the time of his death, in her the said C.'s hands to be administered, if she hath so much thereof in her hands to be administered; and if she hath not so much thereof in her hands to be administered, then the said 5*l.* 10*s.* being the costs and charges aforesaid so adjudged to the said

Judgment
signed
day of
1783.

A. to be levied of the proper goods and chattels of the said *C.*; and the said *C.* in mercy, &c.

Mercy.

Enter the declaration, and plea of plene administration; and hereupon the said *A.* in as much as the said *D.* does not deny the said action of the said *A.* but admits it to be true, that she, the said *D.* hath not any goods or chattels, which were of the said *J.* at the time of his death, in her hands, to be administered (except goods and chattels to the value of 100*l.* as aforesaid), he, the said *A.* prays judgment, and his damages, on occasion of the non-performance of the said several promises and undertakings, to be levied of the goods and chattels so remaining in the hands of the said *D.* unadministered as aforesaid, and of other goods and chattels which were of the said *J.* at the time of his death, when, after final judgment in this respect, they shall come to the hands of the said *D.* to be administered; therefore it is considered, that the said *A.* recover against the said *D.* his damages sustained by reason of the premises aforesaid, to be so levied; but because it is unknown to the court of our Lord the King now here, what damages the said *A.* hath sustained by reason of the premises aforesaid, therefore the sheriff is commanded, that by the oath of twelve honest and lawful men of his bailiwick, he diligently inquire what damages the said *A.* hath sustained by means of the premises aforesaid, as for his costs and charges by him about his suit in this behalf expended; and that the inquisition which he shall there-

Judgment of
assets in fu-
ture.

Vide *Cliff's* .
Entries, 429.

upon take he make appear to our justices at *Westminster*, on the morrow of *All Souls*, under his seal, and the seals of those by whose oath he shall take that inquisition; the same day is given to the parties aforesaid, &c. at which day came here the said *A.* by his said attorney, and the sheriff, to wit, *W. K.* and *L. M.* Esquires, Sheriff of the said county, return a certain inquisition by him taken, &c. on the day of in the twenty third year of the reign of our said Lord the now King, by the oath of twelve honest and lawful men of his bailiwick, by which it is found, that the said *A.* hath sustained damages by reason of the premisc, over and above his costs and charges by him expended, to 150*l.* and for those costs and charges to 20*s.* Therefore it is considered, that the said *A.* recover against the said *D.* his damages aforesaid, by the inquisition aforesaid above found, and also 9*l.* 10*s.* for his said costs and charges, by the court here adjudged of increase to the said *A.* by his assent, which damages in the whole amount to 159*l.* 10*s.* to be levied of the goods and chattels which were of the said *A.* at the time of his death, when such goods and chattels shall hereafter come to the hands of the said *D.* if so much thereof shall come to the hands of the said *D.* to be administered, and if she hath not so much thereof, &c. as in p. 454.

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This judgment is first signed on a treble
ra. i ampt paper (notice must be given in
the usual way to execute the inquiry), and
the

the plaintiff's debt must be proved before the sheriff.

To the end of the demurrer book. At judgment on which day, before our Lord the King, at ^{demurrer to} *Westminster*, came the parties aforesaid, and ^{the replica-} hereupon the premises being seen by the said ^{tion.} court, and fully understood, it appears to the said court here, that the said plea of the said *A.* by way of reply to the said plea of the said *C.* and the matters therein contained, are sufficient in law for the said *A.* to have and maintain his said action against the said *C.* as the said *A.* hath above alleged, for which the said *A.* ought to recover his damages by occasion of the premises, but because it is unknown to the court of our Lord the King, now here, what damages the said *A.* hath sustained by the means aforesaid, the sheriffs are commanded (as in a judgment by default).

Inter all the proceedings to the end of judgment on the issue, then go on thus. At which day and time of comes here the said *C.* by his said attorney, and the said *A.* (although solicitor) coneth not, and it appears to the court here, that the said *A.* hath not neglected to bring the issue above joined on to be tried, according to the court and practice of the said court, therefore, according to the form of the statute in such case made and provided, *It is considered*, by the said court here, that the said *A.* take nothing by his said writ, but that he and his pleads to prosecute, to wit, *John Doe* and *Richard Roe*, be in mercy, &c., and that the said *C.* go thereof without day. and it is so ordered.

considered, that the said C. recover against the said A. 14*l.* 10*s.* for his costs and charges, by him, about his defence in this behalf sustained, adjudged by the court here to the said C. at his request, according to the form of the statute in that case made and provided; and that the said C. have his execution thereof, &c.

Judgment on a replication of suit in record, on a rule to produce.

To the end of the issue. At which day here come the parties aforesaid, by their attorneys aforesaid; and the said C. D. hath not here in court the record of the said judgment by him above in his plea aforesaid alledged, but makes default of producing the said record. *Therefore it is considered,* that the said A. ought to recover his damages by reason of the premises; but because it is unknown to the court here what damages the said A. hath sustained by the means aforesaid, the sheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages, &c. (as in a judgment by default).

Retraint cast.

Entry of a *retraxit* after plea pleaded, and a confession given, on *reducitur finitio*.—At which day came here the parties aforesaid, by their attorneys aforesaid; and hereupon the said C. relinquishes his said plea by him above pleaded, and saith, That he cannot deny the said action of the said A. nor but that he did undertake in promise, in manner and form as the said A. hath above complained against him; nor but that the said A. hath sustained damages, by occasion of the non-performance of the said
several

several promises and undertakings, to 20*l.* as he, the said *A.* hath above, in his said declaration, supposed : and hereupon the said *A.* prays, that the said damages so acknowledged, together with his costs and charges laid out by him about his suit in this behalf, may be adjudged to him. Therefore, &c. (as in a judgment by confession).

Executions.

TO be ingrossed on a 2*s.* 6*d.* stamp parchment, and to be signed by the prothonotaries; pay 4*d.* each, seal 7*d.* and if a *testatum*, 8*d.* signing, seal 1*s.* 2*d.*

If the judgment be in debt on bond, levy the money due to plaintiff, with all the expences of the levy, *sheriff's poundage and officers fees*, which is taken out of the penalty.

If it be levied upon a judgment in case, then only levy the damages recovered with the costs; in this case, add the costs to the damages recovered, and they are *all called damages in the writ*.

There ought not to be two executions ^{cannot be two execu-} existing at the same time; but you may have a *fi. fa.* first, and if the sheriff does not ^{tions} levy to the amount of the debt, or damages recovered, you may have a *ca. fa.* for the residue; in such case, the sheriff should return the *fi. fa.* and the levy thereon first, which ought to be recited in the *ca. fa.*; but if he does nothing on the *fi. fa.* then there is no necessity

necessity to take notice thereof in the *ca. fa.* of its having issued.

An *elegit* may be had after a *fi. fa.* but if once the body is taken, there cannot be a *fi. fa.* or *elegit*; for the body is deemed the highest satisfaction the plaintiff can have.

To be sued out within a year and a day. These executions must be sued out within a year and a day after the judgment signed; and the time is to be accounted from the day of signing the judgment. *Barnes* 197.

But if it be taken out and returned within the year, there needs no *scire facias* before you sue out another; and it is usual to award the first on the roll with the sheriff's return thereon.

Ca. fa. in debt. *The lik' in case.*

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith, &c. To the sheriff of Middlesex, Greeting, I order, greeting: We command you, that you take C. D. your county, yeoman, if he be found in your bailiwick; and him humbly keep; so that you may have his body before our justices at Westmister, on the morrow of St. Saviour's, to satisfy A. B. of 2,100*l.* Dena 500*l.*; which the said A. B. were appointed to be lately

lately in our court, said *John* in our said
before our justices at court, before our jus-
Westminster, recovered tices at *Westminster*,
against him, and also for his damages, which
sixty-three shillings, he had, by reason of
which in our said court the non-performance
were adjudged to the of certain promises and
said *A.* for his dama- undertakings, made
ges, which he had by by the said *Richard* to
occasion of the detain- the said *John* at *Lon-*
ing that debt, where- don, whereof the said
of the said *C. D.* is *Richard* is convicted,
convicted; and have and have these this
there this writ. Wit- writ. Witnesses, *Alex-*
ness, *Alexander* Lord ender Lord *Temple*-
Langbeorn, at *West-* rough, at *Westminster*,
minster, the 9th day of the 9th day of *July*,
July, in the twenty- in the twenty third
third year of our reign. year of our reign.

f. Nixon.

f. Nixon.

I cry 653l. 3s. 6d.
for poundage, officers
fees, and all other inci-
dental expenses.

I cry the whole.

In covenant.

For his damages,
which he had, by rea-
son of a certain breach
of covenant, made be-
tween the said *John*
and *Richard*, whereof
the said *Richard* is con-
victed, &c.

In ejectment for damages

For his damages,
which he had, by oc-
casion of a certain
trespass and ejectment
of farm, done to the
said *John*, by the said
Richard, at *L.* in your
county.

Trespass and assault.

For his damages, which he had, by occasion of a certain trespass and assault, made on the said *John* by the said *Richard*, at *Westminster*, in your county; whereof, &c.

Replevin.

For his damages, which he had, by occasion of the taking and unjustly detaining the cattle of the said *John*, at *W.* in a certain place called the *H.* in your county; whereof, &c.

Trespass.

For his damages, which he had sustained, by occasion of a certain trespass done to the said *John*, by the said *Richard*, at *I.* in your county.

For words.

For his damages, which he had, by occasion of the speaking and publishing certain false and scandalous words by the said *Richard* of the said *John*, at *London*, in your bailiwick, whereof, &c.

For the defendant.

To satisfy *Richard* *Lenn* 14l. 10s. which were adjudged to the said *Richard* in our court, before our justices at *Westminster*, thro' the discretion of the said justice, according to the form of the statute in such case made and provided, for his costs and charges by him laid out about his defence,

On a return.

To satisfy *Richard* *Lenn*, 12l. 10s. which were adjudged to the said *Richard* in our court, before our justices, at *Westminster*, thro' the discretion of the said justices, according to the form of the statute in such case made and provided, for his costs and charges which he hath sustained by reason of the

fence, in a certain plea of trespass, on the said *John*, in a certain case prosecuted in our said court, by the said *John* against the said *Richard*; and have you there this writ. Witnesses, &c.

In a penal action.

To satisfy us and *Jo'n Denn*, who sues as well for us as himself in this behalf, 450*l* debt, which the said *John*, who sues as aforesaid, in our court, before our justices, recovered against the said *Richard* (that is to say), one moiety thereof, to wit, 225*l*. to the said *John*, who sues as aforesaid, to his own proper use, and the other moiety thereof, to our own proper use, according to the form of the statute in such case made

For an administrator.

To satisfy *Jo'n Denn*, administrator of all and singular the goods and chattels, rights and credits, which were of *Janus Wren*, deceased, who died intestate, for 1000*l*. debt; and also 16*l*. 10*s*. for his damages, which he sustained, as well by occasion of the detaining the said debt, as for his expences and costs laid out by him in prosecuting the said suit; whereof the said *Richard* is convicted, &c.

and provided; whereof the said *Richard* is convicted; and have there, &c.

If the execution be taken out after a *jea fa.* then, after the words, "*whereof he is convicted*;" say, "And whereof in our said court, before our justices, it is considered,

" That

“ That the said *John* have his execution
 “ against the said *Richard* of the debt and
 “ damages aforesaid, by the default of the
 “ said *Richard*; and have there this writ.
 “ Witness, &c.”

If the defendant is not to be found in the county, where the *venue* is laid, you must then sue out a *testatum*, which is generally done in the first instance (tho' properly a *ca. sa.* ought first to issue to warrant the *testatum*); the form of which is as follows:

Vide Barnes
 211.

Testatum ca.
sa.

George, &c. (to the end of the first writ, “convicted”). And our said sheriff of *Middlesex*, at a certain day now past, returned to our justices at *Westminster*, That the said *Richard* was not found in his bailiwick; whereas it is testified in our said court, That the said *Richard* lurks and wanders up and down in your county; and have there this writ. Witness, &c. (pay signing at prothonotaries 8d. seal 1s. 2d.) if no *ca. sa.* first sued out.

Fieri Facias.

TO be ingrossed on a 2s. 6d. stamp parchment, signed by the prothonotaries, and sealed; and is to issue only in the county where the *venue* is laid. The stationers have them ready printed. If it be into another county, it is called a *testatum*.

Teste.

There need not *fifteen days* between the *teste* and return of any *ca. la.* or *fi. sa.* (except against *vassal or outlawry*). Stat. 13 Car. 2. c. 2. §. 7, 8.

If it be sued out in *term* time, *teste* the writ the *first day* of the *term* (although the judgment is not signed till *four days* after); if out of term, *teste* it the *last day of the term*.

By *Stat. 29 Car. 2.* the goods are bound only from the time of the delivery of the writ to the sheriff; but lands are bound from the day of the judgment.

It may be sued out against peers as well as others; and if all the money is not levied, the writ must be returned before a second execution can be made out, because the second is granted on the deficiency of the first. *Sa'll. 218.*

A *fi. fa.* being executed fraudulently, a *fi. fa.* at the suit of another afterwards, shall stand good, and be preferred. 1 *W. W.*

44.

The sheriff, that began the execution, shall end it, tho' he is out of office, *Sa'll. 323*, and may sell goods after he is out of his office, without a *renditioni exponas*, Lord Raym. 990.

If the sheriff return, That he has levied the goods, and that they remain in his hands for want of buyers, and he continues in office, a *renditioni exponas* issues to make sale thereof, by which he is compelled to make sale. If he be out of office before he makes sale, then sue out a *distin. ca.*, directed to the new sheriff, to distrain the old sheriff to sell; whereby he is compellable so to do; or you may move for issues against him to the value of the goods. 6 *Mod. 295*, 2 6.

On a *fi. fa.* upon a judgment against one partner, the sheriff may take the goods of both,

both, and the vendee shall have a moiety in common with the other. *Comb.* 217.

If a man died in execution, formerly his executors were no farther chargeable; but now, by *Stat. 21 Jac. 1. c. 24.* "tho' he do die in execution, yet the plaintiff may have an execution against his lands, goods, and chattels." But the judgment must be revived by a *sci. fa.*

It does not abate by the plaintiff's death; but the sheriff must go on to execute his writ. *Mod. Ca. L. & Eq.* 225. *Salk.* 322. 6 *Mod.* 298.

Landlord.

A landlord is entitled to a year's rent in the case of an execution, without deduction, and the sheriff must take care of him, 8 *Ann. c. 14. s. 1.*; but a ground landlord cannot come in for a year's rent on an execution against an under lessee; for the statute only extends to the immediate landlord, *Str.* 787.; but the landlord must give the sheriff notice, or he is not bound. 1 *Str.* 97.

Fi. fa. in case.

Fi. fa. in debt.

George the Third,
Esq. To the sheriff of
Gloucestershire, Greeting:
We command you, That you cause to
be levied of the goods
and chattels in your
bailiwick of C. D. late
of Gloucester, in your
county, yeoman, 50l.
which A. B. in our
court, before our

George the Third,
Esq. To the sheriff of
Middlesex, Greeting:
We command you, That you cause to be
levied of the goods
and chattels in your
bailiwick of C. D. late
of W. in your county,
yeoman, as well as a
certain debt of 60l.
which A. B. in our
court, before our

justices

court,

justices at *Westminster*, before our justices, at *Westminster*, recovered against him, for his damages, recovered against him, which he had, by and also 63s. which means of the not performing certain promises and undertakings lately made by the said C. to the said *A. B.* at *Gloucester*, in your county, whereof the said C. is convicted and have you that money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A.* for his debt and damages aforesaid, whereof the said C. is convicted; and have there this writ. Witness, Witness, &c.

If after a scire facias: after the words,
 “whereof the said C. is convicted,” say, “And
 “whereof it is considered in our same court,
 “That the said A. have his execution against
 “the said B. of the debt and damages aforesaid,
 “by the default of the said B., and have there
 “this writ.” Witness, &c.

If in assault, say, “for his damages, by The like in
 “reason of a certain trespass and assault, assault.
 “lately committed by the said C. on the
 “said A. at *Westminster*, in your county.”

If in covenant, “for his damages, which The like in
 “he sustained, by reason of a certain breach covenant.

" of covenant made between the said C and
" the said A."

The like in
ejectment.

For his damages, which he sustained, by
reason of a certain trespass and ejectment
committed against the said A. by the said C.
at E. in your county.

Testatum si fa in case. Testatum si. fa. in debt.

George, &c. To the sheriffs of London, greeting: We com-
mand you, That you cause to be levied, &c.
(to the end of the fi. fa.) whereof the said C.
is convicted: And our sheriffs of London, at
a certain day now past, sent to our justices,
That the said C. had not any goods or chat-
tels in his bailiwick, whereof he could cause
to be levied the damages aforesaid, or any
part thereof: Whereas it is testified in our
same court, That the said C. hath sufficient
goods and chattels in your bailiwick, where-
of you may cause to be levied the debt and
damages aforesaid, and every part thereof;
and have you there this writ. Witness,
&c.

George, &c. To the sheriff of Middlesex,
greeting, &c. (to the end of the fi. fa.)
whereof the said C.
is convicted: And our
sheriffs of London, at
a certain day now past,
sent to our justices,
That the said C. had
not any goods or chat-
tels in their bailiwick,
whereof they could
cause to be levied the
debt and damages a-
foresaid, or any part
thereof: Whereas it
is testified in our same
court, That the said C.
hath sufficient goods
and chattels in your
bailiwick, whereof you
may cause to be le-
vied the debt and da-
mages aforesaid, and
every part thereof;
and have you there
this writ. Witness,
&c.

A Non

A Non omittas fi. fa. Fi. fa. for the residue in debt.

George, &c. To the Sheriff of Norfolk, greeting: We command you, That you omit not, by reason of any liberty in your bailiwick; but that you enter the same, and cause to be levied of the goods and chattels in your bailiwick of C. D. late of, &c. (the same as a fi. fa.).

Testatum fi. fa. into Durham, in case.

George, &c. To the Reverend Father in God, by divine Providence lord bishop of Durham, greeting: We command you, That by our writ, under the seal of your bishoprick duly to be made, and to the Sheriff of the county of Durham to be directed, you command him, that of the goods and chattels of C. D. late of, &c. in his bailiwick, he cause to be made

*George, &c. greeting: Whereas (to the end of the first fi. fa.); and you at that day returned to our justices, That by virtue of that writ to you directed, you had caused to be made of the goods and chattels of the said C. the sum of 40*l* part of the debt and damages, in the said writ mentioned; which money you had ready at the day and place in the writ mentioned, as by the said writ you was commanded, and that the said C. had not any other, or more goods or chattels in your bailiwick, whereof you could cause to be levied the residue of the said debt and damages, or any part thereof; therefore we command you, that you cause to be levied of the goods and chattels of the said C. in your bailiwick, 6*l*. 3*s*. re-*

*50*l*.;*

II h 3

five

50*l.*; which *A. B.* lately in our court, before our justices, at *Westminster*, recovered against him, for his damages, which he had, by means of the not performing certain promises and undertakings, lately made by the said *C.* to the said *A. B.* at *Westminster*, in the county of *Middlesex*, whereof the said *C.* was convicted; and have you the said money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A. B.* for his damages aforesaid: And our sheriff of *Middlesex*, at a certain day now past, returned to our said justices, That the said *C.* had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof: Whereas it is testified in our same court,

residue of the said sum of 103*l.* 3*s.* which the said *A.* recovered against him in our said court, for his said debt and damages; and that you have that money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A* for the residue of the said debt and damages; and have you there this writ. Witness, &c.

Fi. fa. de bonis ecclesiasticis, in debt.

George, &c. To the Right Reverend Father in God, *Thomas*, by divine Providence lord bishop of *Lincoln*, greeting: We command you, That of the ecclesiastical goods of *C. D.* late of, &c. clerk, in your diocese, you cause to be levied 100*l.* for a debt, which *A. B.* in our court, before our justices at *Westminster*, recovered against him; as also 63*s.* which were adjudged to the said *A. B.*

That

in

Executions.

That the said C. hath in our said court, for sufficient goods and his damages, which chattels in your county he had, by occasion of the detaining that the sheriff of your debt: and have you county palatine may that money before our cause to be levied justices, at *Westminster* the damages aforesaid, *ster*, on the morrow and every part thereof of *All Souls*, to render of; and have you there to the said A. B. for this writ. Witness, his debt and damages aforesaid, whereof the

said C. is convicted;

And our sheriff of *Middlesex*, in three weeks of the *Holy Trinity* last past, sent to our justices, at *Westminster*, That the said C. D. had not any goods or chattels, nor a lay fee in his bailiwick, whereof he could cause to be levied the debt and damages aforesaid, or any part thereof; and that the said C. D. is a beneficed clerk, to wit, rector of the parish and parish church of *W.* in the county of *B.* in the diocese of *Lincoln*; and have you there this writ. Witness, &c. To be signed by the prothonotaries (pay *1s. 4d.* seal *7d.*); and sent to the register of the diocese, who will make out a sequestration, the plaintiff first giving security by bond to the bishop.

Fi. fa. against an executor, where he confesses the debt of the testator.

Fi. fa. against an administratrix in debt.

George, &c. We command you, That you cause to be levied of the goods and chattels

<p>of the goods and chattels in your bailiwick, <i>C. D.</i> late of, &c. at which were of <i>C. D.</i> late of, &c. at the time of his death, in the hands of <i>E.</i> administratrix of all and singular the goods and chattels, rights and credits, which were of the said <i>C.</i> deceased, at the time of his death, who died intestate, to be administered; 40<i>l.</i> which to <i>A. B.</i> in our court, before our justices at <i>Westminster</i>, were adjudged to him for his damages, costs, and charges, which he had, by reason of the non-performance of certain promises and undertakings made by the said <i>C. D.</i> in his life time to the said <i>A.</i> at <i>W.</i> in your county, if she has so much goods and chattels in her hands to be administered; and if she hath not so much thereof in her hands, then that you cause to be levied 40<i>l.</i> being</p>	<p>tels which were of <i>C. D.</i> late of, &c. at the time of his death, in the hands of <i>E.</i> administratrix of all and singular the goods and chattels, rights and credits, which were of the said <i>C.</i> at the time of his death, who died intestate, to be administered in your bailiwick, you cause to be levied 530<i>l.</i> debt, which <i>A. B.</i> lately in our court, before our justices at <i>Westminster</i>, recovered against the said <i>E.</i> administratrix as aforesaid; and also 16<i>l.</i> which in our said court were adjudged to the said <i>A.</i> for his damages, costs, and charges, which he had, by means of detaining the said debt, if she hath so much goods and chattels of the said <i>C.</i> at the time of his death in her hands to be administered; and if she hath not, then that you cause to be</p>
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~~SECTIONS.~~

the costs and charges levied the said *rs*l. the
of the said *A*. and par- damages, costs, and
cel of the damages charges aforesaid, of
aforesaid of the proper the proper goods and
goods and chattels of chattels of the said
the said *E*.; and have *E*.; and have you that
that money before our money before our jus-
tices at *Westminster*, tices at *Westminster*,
on the morrow of *All* on the morrow of *All*
Sou's, to render to the *Sou's*, to render the
said *A*. for his da na- said *A*. for his debt
ges aforesaid, whereof and damages afore-
the said *E*. is con- said, whereof she is
victed; and have there convicted; and have
this writ. Witness, you there this writ.
Ec. Witness, *Ec.*

If it be against an executor, add the words,
Executor of the last will and testament of,
Ec. deceased.

Fi sa. for defendants costs in case.

George Ec. That you cause to be levied
of the goods and chattels of *A. B.* in your
bailiwick *4l. 10s.* which were awarded to
the said *D.* in our court, before our justices
at *Westminster*, thro' the discretion of the said
justices, according to the form of the statute
in such case made and provided, for his costs
and charges by him expended in and about his
defence, in a certain plea of trespass on the
case (*as the action is*), prosecuted in our said
court, by the said *A.* against the said *D*.; and
have you that money before our justices at
Westminster, on, *Ec.*, and have there this
writ. Witness, *Ec.*

For costs on a nonsuit. Venditioni exponas.

George the Third, George, &c. To the
&c. To the sheriff of sheriff of *Middlesex*,
Middlesex, greeting: greeting: Whereas
We command you, we lately commanded
That you cause to be you, That you should
levied of the goods cause to be levied of
and chattels in your the goods and chattels
bailiwick, of *A.B.* 14*l.* of *C. D.* late of, &c.
which were awarded 30*l.* which *A. B.* lately
to *C. D.* in our court, in our court, before
before our justices at our justices at *West-*
Westminster, according *minster*, recovered a-
to the form of the sta- gainst him for a debt;
tute in such case made and also 63*s.* which,
and provided, thro' &c. (*here insert the*
the discretion of the writ verbatim); and
said justices, for his that you should have
expences and costs, that money before our
which he had been put justices at *Westminster*,
to, by reason of the on, &c. to render to
false claim of the said the said *A.* for his debt
A. in a certain plea of and damages afore-
trespass on the case said; And you at that
prosecuted in our said day sent to our said
court by the said *A.* justices at *Westminster*,
against the said *C.*; and That you had levied
have you that money the goods and chattels
before our justices at of the said *C.* to the
Westminster, &c. Wit- value of the debt
ness, &c. and damages afore-
said; which said goods and chattels remained
in your hands for want of buyers, therefore
we being desirous that the said *A.* be satis-
fied his said debt and damages, command you,
That you sell, or cause to be sold, the said
goods

~~Writ of Execution~~
goods and chattels, and every part thereof, for the best price that can be got for the same, at least for the debt and damages aforesaid; so that you have that money arising from such sale, before our justices at Westminster, on, &c. to render to the said A. B. for his debt and damages aforesaid; and have there this writ. Witness, &c.

This writ is to be signed at the prothonotaries; pay 1s. 4d. seal 7d.

If the lands are extended upon an *elegit*, *Elegit*. the plaintiff is for ever barred from having another execution; but if he levies on the goods upon the *elegit*, and the sheriff return *nihil* as to the land, a *ca. sa.* may issue for the residue against the defendant; for the election cannot be complete, unless the plaintiff has some benefit from the land. *Str.* 226.

Upon an *elegit* the sheriff is to impanel Sheriff's duty. a jury (but no notice thereof is given to the other side), who are to make enquiry of all the goods and chattels of the debtor, and to appraise the same, and also to enquire as to his lands and tenements, and upon such inquisition, the sheriff is to deliver all the goods and chattels (*except the beasts of the plough*), and a moiety of the lands, to the party, and must return his writ in order to record such inquisition. *2 Inst.* 396.

The sheriff does not put the plaintiff in possession, therefore; in order to recover, he must bring an ejectment.

Elegit

To be signed
by the pro-
thonotary;
pay 1s. 4d.
seal 7d.; to
be ingrossed
on a 2s. 6d.
stamp parch-
ment.

Elegit in Debt.
George the Third.
To the Sheriff
of Kent, greeting:
Whereas *A. B.* lately
in our court, before
our justices at *West-*
minster, by the con-
sideration of the said
court, recovered a-
gainst *C. D.* late of,
Ec. as well a certain
debt of 100*l.* as 63*s.*
which in our said
court were adjudged
to the said *A.* for his
damages, which he
had, by means of the
detaining the said
debt, whereof the said
C. D. is convicted;
and because

Elegit in Case.
George the Third.
To the Sheriff
of Kent, greeting:
Whereas *A. B.* lately
in our court, before
our justices at *West-*
minster, by the con-
sideration of the said
court, recovered a-
gainst *C. D.* late of,
Ec. 100*l.* which in
our said court were
adjudged to the said
A. for his damages,
which he had, by
means of the non-
performance of cer-
tain promises and un-
dertakings made by
the said *C.* to the said
A. at *W.* in your
county, whereof the
said *C.* is convicted,
and because

the said *A. B.* came in our court before our
said justices, and by the statute in that case
made and provided, chose to have delivered
to him all the goods and chattels of the said
C. D. (except the oxen and beasts of his plough),
and likewise a moiety of all and singular the
lands and tenements of the said *C. D.* in your
bailiwick, to hold to him the goods and
chattels aforesaid, as his own proper goods
and chattels; and also to hold the said moiety
as his freehold to him and his assigns, ac-
cording

According to the form of the said statute, until he shall thereof have levied the said debt and damages; and therefore we command you, that without delay, you cause to be delivered to the said *A.* by reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick (*except the oxen and beasts of his plough*), and likewise a moiety of all the lands and tenements of the said *C. D.* in your bailiwick, of which the said *C. D.* on the day of

(the day judgment was signed)

in the twenty-third year of our reign (on which day the judgment was given), was, or at any time since hath been seized to him the said *A.* to hold to him the said goods and chattels, as his own proper goods and chattels, and also to hold to him and his assigns, a moiety of the said lands and tenements as his own free tenements, according to the form of the said statute, until he shall thereof have fully levied the said debt and damages: And in what manner you shall have executed this our writ, make appear to our justices at *Westminster*, on the morrow of *All Souls*, under our seal, and the seals of them by whose oath you shall make the said extent and appraisement; and have there this writ. Witness, &c.

A man may award on the roll as many *elegits* as he pleases, and execute all, or any, at his pleasure; but it is said, if he awards an *elegit* in one county, extends the lands upon the writ, and afterwards file it, he is barred, and cannot sue out an *elegit* into another county; but an actual writ ought to be sued out, to save a *scire facias*.

Where

What proof is
necessary to
support an
ejectment on
an *elegit*.

Where by inquisition on an *elegit*, it is found that the plaintiff was seized of the lands, at the time the judgment was given upon an ejectment, which must be brought to recover the possession, the plaintiff need only give in evidence the office copy of the judgment, *elegit*, and inquisition thereupon filed, and is not bound to prove the party seized at the time of the judgment; and if he was not seized, it must be proved by the other side. *Gilh. L. of E.* 10. vide *Salk.* 563. *Ld. Ray*, 718.

Of Reviving Judgment by scire facias.

BY the common law, a plaintiff could not have execution upon a judgment or recognizance, after a year and a day passed; but ought to commence an action of debt upon the judgment, or recognizance, 2 *Inst.* 469. *Co. Lit.* 290. b. But now, by *Stat. W.* 2. 13 *Ed.* 3. c. 45. he may have a *scire facias quare executionem non*.

Sci. fa. must
be sued out in
the county
where the ori-
ginal action
was
brought.

If there has been no *ca. fa. fi. fa. elegit*, or *hab. fac. possessionem* sued out, within the year and day, then, in order to revive the judgment, and take out execution, you must sue out a *scire facias* into the county where the *venue* is laid, the court supposing the defendant to reside in the same county where the original action was brought. Vide *Barnes* 207.

No *sci. fa.*
necessary, if
defendant has
made the de-
lay.

This *sci. fa.* was intended to prevent a surprize upon the defendant after the year and day elapsed; but where he affects the delay, by bringing a writ of error, or it is stayed

Execution

Stayed by injunction, though above a year and day, yet execution may be taken out without a *scire facias*. Vide 2 Burr: 666. Str. 301.

If a writ of execution be once sued out, and entred on the roll, it may be continued until you sue out and execute a new one, and be as effectual as if new writs were issued every term. If once sued out and continued, need not sue sci. fa.

The year shall be computed from the day of signing judgment, not by the number of terms. *Barnes* 197. Computation of the year.

There needs no *sci. fa.* if error be brought on the judgment within a year after the judgment, till a year and a day after the error or judgment thereon affirmed. 5 Co. 88. If error brought, no need of a sci. fa. till a year and day after affirmance.

If execution is not returned by the sheriff, or not filed, continuances on it cannot be entred on the roll; and if they are, and thereupon a *ca. fa.* after the year, without *sci. fa.* defendant shall be discharged out of custody, and plaintiff pay costs. 2 Wils. 82. If execution not returned, or not filed, continuances cannot be entered.

Barnes 213.

If judgment be with *cesset executio* by agreement, till such a time, there needs no *sci. fa.* till a year and day after the time agreed, though such *cesset*, &c. is not entred on the roll. *Mod. Caf.* 288. If judgment with a cesset executio, needs no sci. fa. till year and day after time elapsed.

If a man recovers a judgment, and the defendant dies before execution, the judgment must be revived by *scire facias* against his executors or administrators. On death of defendant, judgment to be revived.

So if plaintiff dies, his executor or administrator must revive the same by *sci. fa.* unless executed before his death. The like on death of plaintiff.

If

If two plain-
tiffs, and one
defendant, no need
for *sci. fa.*
The like of
the defendant.

If there be two plaintiffs in a personal
action, and one of them dies, that shall not
put the other to a *sci. fa.* So if one of the
defendants die, but there must be a sug-
gestion of the death made on the record.
Stat. 8 Ed. 3. c. 10.

Sci. fa. sued
out of course
within seven
years; after
that a rule
must be had.

The writ of *scire facias*, to revive a judg-
ment after a year and day, may be sued out
of course at any time, within seven years af-
ter the judgment signed, if it is to be done
after, a motion must be made in the trea-
sury for that purpose, without affidavit;
draw up rule with the secondary, pay 6s.;
there is no occasion to serve it on the de-
fendant.

If ten years,
motion must
be made in
court.

If the judgment be *ten years* standing, and
no execution, then you must give brief to a
serjeant, to move for leave to enter it up;
fee 10s. 6d.; it is a motion of course, and no
affidavit is requisite; draw up rule with se-
condary, pay 7s. then sue out *sci. fa.* of
which the defendant must have notice, if
not, no execution is to issue, though there
are two *nibils*. 2 *Black. Rep.* 1141.

In this court, one *sci. fa.* is sufficient, with
a *nihil* returned thereon; because it having
fifteen days between the *teste* and *return*,
makes it equal to two in the K. B.; but it
must lie *four days* in the *Sheriff's office* before
the return.

Sci. fa. in debt.

*Sci. fa. after a year and
day in case.*

George the Third, by
the grace of God, of
Great Britain, France,
and Ireland, king, de-
fender

George the Third, by
the grace of God, of
Great Britain, France,
and Ireland, king, de-
fender

fender of the faith. To the sheriff of *Middlesex*, greeting, Whereas *John Denn*, lately in our court, to wit, in the term of *Easter*, in the 22d year of our reign, before *Alexander Lord Loughborough*, and his companions, then our justices of the Bench, at *Westminster*, by the consideration of the same court, recovered against *Richard Fenn*, late of *Westminster*, in the said county, hofier, as well a certain debt of 100*l.* as 63*l.* which were adjudged to the said *John Denn*, in our same court for his damages, which he had by occasion of the detaining of that debt, whereof the said *Richard* is convicted, as by the record and proceedings remaining in our same court, before our justices at *Westminster*, manifestly appeareth; yet execution of the said judgment still remaineth to be made, as on the information of the said *John* we have been given to understand; and because we are willing that those things which in our said court are rightly done and transacted, We command you, that by good and lawful men of your bailiwick, you make known to the said *Richard*, that he be before our justices at *Westminster*, on the morrow of *All Souls*, to shew if any thing he hath, or knoweth, to say for himself, why the said *John* ought not to have execution against him for the debt and damages

fender of the faith. To the sheriff of *London*, greeting, Whereas, *John Denn*, lately in our court, to wit, in *Easter* term, in the 22d year of our reign, before *Alexander Lord Loughborough*, and his companions, then our justices of the Bench, at *Westminster*; by the consideration of the same court, recovered against *Richard Fenn*, late of *London*, yeoman, 100*l.*; which to the said *John*, in the same court, were adjudged for his damages which he had, by occasion of the notperforming certain promises and undertakings made by the said *Richard* to the said *John*, at *London* aforesaid, whereof the said *Richard* is convicted, as (here goon as in the other, only leave the word *debt* out)

If in debt.

Replevin Judgments.

aforesaid, according to the form and effect of the said recovery, if it shall seem expedient to him so to do; and have there the names of them, by whom you shall make known to him, and this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the 23d year of our reign.

If in trespass. For his damages which he had, by means of a certain trespass committed by the said *Richard*, at *Westminster*, in your county.

If in trespass and assault. For his damages which he had, by occasion of a certain trespass and assault, made by the said *Richard* on the said *John*, at *London*, in your bailiwick.

If in covenant. For his damages which he had, by means of a certain breach of covenant, made by the said *Richard* to the said *John*, whereof, &c.

How *sci. fa.* to be sued out. This writ is to be ingrossed on a 2s. 6d. stamp parchment, and signed by the prothonotaries, pay 1s. 4d. and 7d. seal. Indorse on it the attorney's name, and place of abode, and the day sued out, "to be returned nihil." Then leave it at the sheriff's office to be returned, pay, if one defendant, 1s.; when it is returnable, call on sheriff for it; take it to the prothonotaries office, and the clerk will give you the remembrance roll, to enter it on; which being done, a rule will be given thereon to appear, which is out in four days; pay rule and duty 2s. The clerk will then give you a roll to make the entry thereon, and judgment complete; which being done, and the rule out, he will sign judgment on the roll, and docket it, pay 2s.; file writ of *sci. fa.* with the *custos breviarum*, pay 4d.; then you are at liberty to take out execution.

All writs of *sci. fa.* are to be entered first on the remembrance roll before a rule can be given.

Quashing *sci. fa.* Quashing *sci. fa.* Plaintiff on motion in the treasury, may quash his own *sci. fa.* without paying costs, though the defendant has appeared; for no costs shall be paid on proceedings by *sci. fa.* till plea pleaded, *Barnes* 431. it cannot be amended.

Revising Judgments.

Middlesex, to wit. The sheriff was commanded, Entry on the roll of one sci. fa.
Whereas *John Dinn*, lately in our court, to wit, in the term of *Easter*, in the 22d year of the reign of our Lord the now King, before *Alexander Lord Loughborough*, and his companions, then justices of the Bench at *Westminster*, by the consideration of the same court, recovered against *Richard Penn*, late of *Westminster*, in the said county, hofier, as well a certain debt of 100*li* as 6*3s*. which were adjudged to the said *John*, in our same court, for his damages, which he had by occasion of the detaining that debt, whereof the said *Richard* is convicted, as by the record and proceedings thereof, remaining in the same court, before our justices at *Westminster*, manifestly appeareth; yet execution of the said judgment still remaineth to be made, as on the information of the said *John*, the king hath been given to understand, and because, &c. that by good, &c. he make known to the said *Richard*, that he be here at this day, to wit, on the morrow of *All Souls*, to shew if any thing, &c. why the said *John* ought not to have execution against him for the debt and damages aforesaid; according to the form of the said recovery, &c. And now here at this day came the said *John* by S. U. his attorney, and offered himself on the fourth day against the said *Richard*, in the plea aforesaid; and he being solemnly demanded came not, and the sheriff, to wit, Sir *Robert Taylor*, Knt. and *Benjamin Cole*, Esq. sheriff of the said county, now sendeth, that he hath nothing in his bailiwick whereby he can make known to the king's justices, as by the said writ he is commanded, nor is the said *Richard* found in the same: *It is therefore considered*, that the said *John* have execution against the said *Richard*, for the debt and damages aforesaid, by the default of the said *Richard*, &c. Judgment.

If the judgment be above twenty years old, then How to pro-
the court must be moved upon an affidavit of the deed, if judg-
debt being due, the defendant living, the judgment ment be above
in full force, and no execution taken out; therefore twenty years
the affidavit upon an old warrant of attorney in old.

Rebivling Judgments.

p. 447. as to two particulars, will do, and state, "that judgment was recovered in such a term; and no execution having issued," and there must be a *scire feci* returned by the sheriff, or an affidavit made that defendant had notice of the *sci. fu.* before execution sued out, according to the case in 2 *Black. Rep.* 1141. 995.

On a judgment of above twenty years old, the court (according to a precedent said to have been settled above nine years ago) gave leave to the administrator, *cum testamento annexo* of the plaintiff, to sue out a *scire facias* to revive the same; but that no execution should be taken out thereon, until either the sheriff makes an actual return of *sci. feci*, or an affidavit be made and filed of personal notice being served on the defendant of the issuing such *scire facias*. 2 *Black. Rep.* 995. *Coystearne v. Fly*.

Sci. fa. in debt for an administrator.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: *Whereas John Denn*, lately in our court, to wit, in the term of *Easter*, in the 23d year of our reign, before *Alexander Lord Loughborough* and his companions, then our justices of the Bench at *Westminster*, by the consideration of the same court, recovered against *Richard Fenn*, late of *Westminster*, in the said county, hosier, as well a certain debt of 200*l.* as 63*s.* which in our said court were adjudged to the said *John* for his damages, which he had,

by

Sci. fa. for an executor in case.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: *Whereas John Denn*, lately in our court, to wit, in the term of *Easter*, in the 23d year of our reign, before *Alexander Lord Loughborough* and his companions, then our justices of the Bench at *Westminster*, by the consideration of the same court, recovered against *Richard Fenn*, late of *Westminster*, in the said county, hosier, 40*l.* which to the said *John* in the same court were adjudged for his damages, which he had, by occasion of the not performing certain

pro-

by occasion of the detaining that debt, whereof the said *Richard* is convicted, as by the record and proceedings thereof, remaining in our said court, manifestly appeareth; yet execution of the said judgment still remains to be made; and the said *John* is since dead, as we have received information from *Elizabeth Denn*, administratrix of all and singular the goods and chattels, rights, and credits, which were of the said *John Denn* at the time of his death.

promises and undertakings made by the said *Richard* to the said *John*, at *Westminster* aforesaid; whereof the said *Richard* is convicted, as by the record and proceedings thereof remaining in our said court manifestly appears; yet execution of the said judgment still remaineth to be made; and the said *Richard* is since dead, as we have received information from *Elizabeth Denn*, executrix of the last will and testament of *John Denn*, deceased.

And we being willing that those things which in our same court are rightly done and transacted, Command you, that by good and lawful men of your bailiwick, you make known to the said *Richard*, that he be before our justices at *Westminster*, on the morrow of *All Souls*, to shew if he hath or knoweth of any thing to say for himself, why the said *Elizabeth* ought not to have execution against him for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for her so to do; and have there the names of them by whom you shall so make known to him, and this writ. *Witness*, &c.

On motion of *Walker*, the executor of the plain- No execution
tiff had leave to sue out a *sci. fa.* to revive a judgment of ten years standing; but execution not to revive an old
sue as formerly, on the return of two *nils*, but judgment, till
either on a return of *scire feci*, or on an affidavit of a *sci. feci* re-
personal notice to the defendant, that such writ of turned, or an
scire facias hath been prosecuted; according to a affidavit of
precedent settled. *P. 6 Geo. 3. between Yarker and notice.*
Reynoldson, 2 Black. Rep. 1140. Eagnall v. Gray.

Revolving Judgments.

*Suits, against an executor
in debt.*

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the sheriff of Middlesex, greeting: Whereas John Denn, lately in our court, to wit, in the term of Easter, in the twenty-second year of our reign, before Alexander Lord Loughborough and his companions, then our justices, &c. (as in the other); yet execution of the said judgment still remaineth to be made; and whereas the said Richard is since dead, having first duly made his last will and testament, and appointed Elizabeth Fenn executrix thereof, as we have been informed in our said court; whereupon the said John hath besought us to provide him a proper remedy in this behalf.

The like against an administrator.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the sheriff of Middlesex, greeting: Whereas John Denn, lately in our court, to wit, in the term of Easter, in the twenty-second year of our reign, before, &c. (to the words manifestly appeareth); yet execution of the said judgment still remaineth to be made; and the said Richard is since dead in testate, and administration of all and singular the goods, chattels, and credits, which were of the said Richard at the time of his death, was committed, and granted to Elizabeth Fenn, widow, and relict of the said Richard, in due form of law, as we have received information from the said John; whereupon the said John hath besought us to provide him a proper remedy in this behalf.

And because we are willing that those things which in our same court are rightly done and transacted, Command you, that by good and lawful men of your bailiwick, you make known to the said Elizabeth, that she be before our justices at Westminster, on the morrow of All Souls, to shew if any thing she has or knows

Rebbling Judgments.

knows to say for herself, why the said *John* ought not to have his execution against her, for the *judgments* * *debt and* *damages* aforesaid, to be levied of the goods and chattels which were of the said *Richard* at the time of his death, in her hands to be administered, according to the form of the said recovery, if it shall seem expedient for her so to do; and have there the names of them by whom you shall make known to her, and this writ. *Witness, &c.*

In these cases there must be a *scire feci* returned by the sheriff, or an *alias* must be sued out and returned, with the first, *nihil*; and there does not need *fifteen days* between the *teste* and *return* of each; but if there are *fifteen days* between both, it will be sufficient.

Entry of sci. fa. for an administrator on the roll.

Middlesex, to wit. The sheriff was commanded, *Whereas John Denn*, lately in our court, to wit, in the term of *Easter*, in the twenty-second year of the reign of our Lord the now King, before *Alexander Lord Loughborough* and his companions, then justices of our said Lord the King of the Bench here, to wit, at *Westminster* (the same as in the first entry of a *sci. fa.* in p. 483.), yet execution of the said judgment still remains to be made; go to the word (*recovery*), then say, if, &c. And now here at this day came the said *Elizabeth*,

The like for an executor.

Middlesex, to wit. The sheriff was commanded, *Whereas John Denn*, lately in our court, to wit, in the term of *Easter*, in the twenty-second year of the reign of our Lord the now King, before *Alexander Lord Loughborough* and his companions, then justices of our said Lord the King of the Bench here, to wit, at *Westminster*, by the consideration of the same court, recovered against *Richard Fenn*; to the word (*recovery*); then say, if, &c. And now here at this day came the said *Elizabeth*, by *A. B.* her attorney, and offered

Elizabeth, by *A. B.* her attorney, and offered herself, on the fourth day, against the said *Richard*, in the plea, aforesaid; and the said *Richard* (although solemnly demanded) came not; and the sheriff, to wit, Sir *Robert Taylor*, Knight, and *Benjamin Cole*, Esquire, sheriff of the said county, now returneth, That the said *Richard* hath nothing in his bailiwick, whereby he can make known to him, as by the said writ he is commanded, nor is the said *Richard* found in the same: And upon this the said *Elizabeth* bringeth here into court the letters of administration of the said *John*, by which it sufficiently appears to the court here, that the said *Elizabeth* is administratrix of all and singular the goods, chattels, and credits of the said *John*, and hath the administration thereof, &c. And she prayeth execution against the said *Richard* of the debt and damages aforesaid, in form aforesaid, to be adjudged to her, &c. It is therefore considered, That the said

Elizabeth

ed herself on the fourth day, against the said *Richard*; and the said *Richard*, being solemnly demanded, came not; and the sheriff, to wit, Sir *Robert Taylor*, Knight, and *Benjamin Cole*, Esquire, sheriff of the said county, now returneth, That the said *Richard* hath nothing in his bailiwick, whereby he can make known to him, as by the said writ he is commanded, nor is the said *Richard* found in the same: And upon this the said *Elizabeth* bringeth here into court the letters testamentary of the said *John*, by which it sufficiently appears to the court here, that the said *Elizabeth* is the executrix of the last will and testament of the said *John Denn* deceased, and hath the administration thereof, &c. And she prayeth execution against the said *Richard* of the damages aforesaid, in form aforesaid, to be adjudged to her, &c. It is therefore considered, that the said *Elizabeth*, executrix as aforesaid, have execution against the said *Richard* for the damages aforesaid.

Executing Judgments.

Elizabeth, administratrix aforeſaid, by the default as aforeſaid, have execution againſt the ſaid *Richard* for the debt and damages aforeſaid, by the default of the ſaid *Richard*, &c.

Entry of two ſci. fa. againſt an adminiſtratrix on the roll, where they are both of one term.

Middleſex, to wit. The ſheriff was commanded, Whereas *John Denn*, lately in our court, to wit (as in the laſt entry to the end of the ſheriff's return); then ſay, Therefore, as before, the ſheriff was commanded, that by good, &c. he ſhould make known to the ſaid *Elizabeth*, that ſhe ſhould be here at this day, to wit, in fifteen days of Saint *Martin*, to ſhow in form aforeſaid, if, &c. At which day came the ſaid *John*, by his ſaid attorney, and offered himſelf, on the fourth day, againſt the ſaid *Elizabeth*; and the ſaid *Elizabeth*, being ſolemnly demanded, came not; and the ſheriff, as before, returneth, that ſhe hath nothing in his bailiwick, where or by which he can give notice to the ſaid *Elizabeth*, as by the ſaid writ he is commanded; or is the ſaid *Elizabeth* found in the ſame; and upon this the ſaid *John* prays execution againſt the ſaid *Elizabeth*, of the debt and damages aforeſaid, to be levied of the goods and chattels which were of the ſaid *Richard*, at the time of his death, in her hands, to be adminiſtered, if ſhe hath ſo much thereof in her hands to be adminiſtered. *It is therefore conſidered*, That the ſaid *John* have execution againſt the ſaid *Elizabeth*, adminiſtratrix as aforeſaid of the goods and chattels which were of the ſaid *Richard* at the time of his death, in the hands of the ſaid *Elizabeth*, to be adminiſtered, if ſhe hath ſo much thereof in her hands, &c. by the default of the ſaid *Elizabeth*, &c.

N. B. This will ſerve againſt an executor.

Præcipe.

In proceeding by *sci. fa.* to revive a judgment, it is seldom that the defendant appears; but if he does, it is done with the prothonotaries, by making a *præcipe* thus: *Middlesex. Appearance for Richard Fenn, ats. John Denn, to a sci. fa. returnable on the morrow of All Souls, T. B. attorney; pay 3s. 10d.* If there be no appearance, then the plaintiff's attorney declares against him, and proceeds as in other cases.

If there be two *sci. fa.*'s sued out, as in the latter case, *viz.* against an *executor* or *administrator*, and they be returnable in different terms, then enter on the roll the first *sci. fa.* with an award of the second, in the same manner as the last entry, to the day of the return of the second, "*as of the term the first sci. fa. is returnable;*" then enter on another roll, which you get of the prothonotaries, as of the term the second *sci. fa.* is returnable, (after you have entered the same on the remembrance roll), thus:

Entry on the
second *sci. fa.*
roll.

Middlesex; to wit. Elsewhere, as it appears, of Michaelmas term last past, on the 598th roll, it is thus contained: Middlesex to wit; The sheriff was commanded (to the end of the first sci. fa. return, and award of the second), then go on thus: At which day the said John, by A. B. his attorney, cometh and offereth himself, on the fourth day, against the said Elizabeth, in the plea aforesaid; and the said Elizabeth, although solemnly called; came not; and the sheriff, to wit, Sir Barnard Turner, Knight, and Thomas Skinner, Esquire, sheriff of the said county, now return, that the said Elizabeth hath not any thing in his bailiwick, where or by which he can give her notice, as by the said writ he is commanded; nor is the said Elizabeth found in the same: And thereupon the said John prayeth execution

execution against the said *Elizabeth*, of the debt and damages aforesaid, to be levied, &c. (as in the last entry exactly.)

By the 8 & 9 W. 3. c. 10. s. 6. " That if any Proceedings
 " plaintiff happen to die after an interlocutory by an executor
 " judgment, and before a final judgment obtained or administra-
 " therein, the said action shall not abate by reason tor after in-
 " thereof, if such action might originally be prose- terlocutory
 " cuted or maintained by the executors or admini- judgment.
 " strators of such plaintiff. And if the defendant die
 " after such interlocutory judgment, and before
 " final judgment therein obtained, the said action
 " shall not abate, if such action might originally
 " be prosecuted or maintained against the executors
 " or administrators of such defendant: And the
 " plaintiff, or if he be dead after such interlocu-
 " tory judgment, his executors or administrators,
 " shall and may have a *scire facias* against such de-
 " fendant, if living, after such interlocutory judg-
 " ment, or if he died after, then against his exe-
 " cutors or administrators, to shew cause why da-
 " mages in such action should not be assessed and
 " recovered by him or them: And if such defend-
 " ant, his executors or administrators, shall ap-
 " pear at the return of such writ, and not shew or
 " alledge any matter sufficient to arrest the final
 " judgment; or being returned warned, or upon
 " two writs of *scire facias* it be returned, that the
 " defendant, his executors or administrators, had
 " nothing whereby to be summoned, or could not
 " be found in the county, should make default,
 " that thereupon a writ of inquiry of damages shall
 " be awarded; which being executed and return-
 " ed, judgment final shall be given for the plain-
 " tiff, his executors, or administrators, prose-
 " cuting such writ or writs of *scire facias* against
 " such defendant, his executors or administrators
 " respectively."

If the plaintiff dies after interlocutory judgment signed, and before inquiry, make out

Rebelling Judgments.

out the following *sci. fa.* in the county where the action is laid, and also an *alias* against his executors, if any, or his administrator; which is to be signed by the prothonotary, sealed, and entered as before.

Sci. fa. where the plaintiff died after interdictory judgment, and before final judgment.

George the Third, &c. To the sheriffs of London, greeting: *Whereas John Denn*, in his life time, lately in our court, to wit, in *Easter* term, in the twenty-third year of our reign, before *Alexander Lord Loughborough* and his companions, then our justices of the bench, at *Westminster*, by our writ, impleaded *Richard Penn*, late of, &c. merchant, declaring in the same plea against him, *For that whereas* (here set forth the whole declaration), and therefore he brought suit, &c. And afterwards, to wit, in that very same term, in the year aforesaid, the same *Richard*, in his proper person, came into our same court, and defended the wrong and injury, when, &c. but said nothing in bar or preclusion of the said action of the said *John*, whereby the said *John* remained therein undefended against the said *Richard*; and such proceedings were thereupon had, in our same court, that the said *John* ought to recover his damages by occasion of the premises: but because it was unknown what damages the said *John* had sustained, by means of the premises aforesaid; *It was commanded* to the then sheriffs, that by the oath of twelve good and lawful men of their bailiwick, they diligently inquire what damages the said *John* had sustained, as well by occasion of the premises, as for his costs and charges by him laid out about his suit in that behalf; and that they should send the inquisition, which they should thereupon take to our justices at *Westminster*, on the morrow of *All Souls*, under their seal, and the seals of those by whom they should take that inquisition; as by the record and proceedings thereof remaining in our same court, at *Westminster* aforesaid (relation being thereto had), will more fully and at large appear: yet inquisition of the said damages still remains

mains to be made; and the said *John*, after interlocutory judgment had been given in form aforesaid, and before the return of the said writ of inquiry, by us to the said Sheriffs sent, as aforesaid, for the purpose aforesaid, died *, having first duly made his last will and testament in writing, and appointed *Richard Sims* sole executor thereof; upon whose death the said *Richard* duly proved the said will in the prerogative court of *Canterbury*, in due form of law, and took upon himself the burthen of the execution thereof, as by the letters testamentary thereof, produced here in court to our justices, by the said *Richard Sims*, fully appear; and because we being willing that those things which in our same court be rightly done and transacted, We command you, that by good and lawful men of your bailiwick, you make known to the said *Richard Fern*, that he be before our justices at *Westminster*, in fifteen days of *St. Martin*, to shew if he has, or knows of any thing to say for himself, why the damages in the said action should not be assessed to the said *Richard Sims*, executor as aforesaid, according to the form of the statute in such case made and provided, if it shall seem expedient for him so to do; and further to do and receive what our said court shall then and there consider of him in this behalf; and have you there the names of them by whom you shall so make known to him, and this writ. Witness *Alexander* Lord *Loughborough*, at *Westminster*; the 9th day of *July*; in the twenty-third year of our reign.

* Intestate and administration of an and singular the goods, chattels, rights, and credits, which were of the said *John* at the time of his death, was by *Thomas*, by divine Providence archbishop of *Canterbury*, primate of all *England*, and metropolitan, committed and granted to *Richard Sims*; to wit, at *Westminster* aforesaid, as by the letters of administration thereof produced, &c.

If a *nihil* be returned according to the above statute, an *alias sci. fa.* must issue; and you must enter them *verbatim* on the prothonotaries remembrance roll; and give a rule as before.

Upon the entry of the first *sci. fa.* on the Entry roll, you award the second as far as the return, in the same manner as in p. 489. provided they be of different terms, if not, one roll

roll is sufficient; and after the award of the second *sci. fa.* "say."

And thereupon the said *Richard* prayeth, That the damages aforesaid, by the said *John* in his life time sustained, on occasion of the premises aforesaid, may be assessed and adjudged unto him; *Therefore it is considered*, that the damages aforesaid, by him the said *John* in his life time sustained, on occasion of the premises aforesaid, be assessed and recovered by the said *Richard Sims*, executor as aforesaid, according to the form of the statute in such case made and provided, by the default of the said *Richard*; and because it is still unknown what damages the said *John* hath sustained by occasion of the said premises, therefore, as before, the sheriffs are commanded, that by the oath of twelve good and lawful men of their bailiwick, they diligently inquire, what damages the said *John* hath sustained, as well by reason of the premises, as for his costs and charges by him laid out about his suit in that behalf; and the inquisition which they shall thereupon take, make appear to our justices at *Westminster*, in, &c. under their seal, and the seals of those, by whose oath they shall take the said inquisition, &c. (the clerk of the judgments enters the final judgment hereon, after the costs are taxed).

If the defendant does not appear to the second *sci. fa.* after the rule is expired, sign judgment with the prothonotaries, as in the case of other *sci. fa.*'s give notice of executing a writ of inquiry, and proceed to final judgment, as in other cases.

Appearance. But if the defendant appears, then he enters it as before with the prothonotaries, and pays 3*s.* 10*d.*; therefore before judgment is signed; search for appearance in the prothonotaries book.

Declaration. *London*, (ff.). It was commanded to the sheriff, *Whereas* (to the end of the entry on the second roll, as far as the sheriff's return on the *alias*, then say); and the said *Richard* at that day being solemnly called, comes by *S. U.* his attorney; and thereupon the said *Richard Sims*, executor as aforesaid, prays
that

that the damages in the said action may be assessed, and recovered by him the said *Richard Sims*, according to the form of the statute, in that case made and provided, &c.

If a defendant dies after a writ of inquiry executed, and before the return thereof, it is within the act; and the *sci. fa.* against his executor or administrator must be "to shew cause why the damages assessed should not be covered." 1 Wils. 243. 1 Salk. 115. Lill. Entr. 647.

George the Third, &c. To the sheriff of *Middlesex*, greeting, *Whereas John Denn*, lately in our court, to wit, in *Easter* term, in the twenty-third year of our reign, before *Alexander Lord Loughborough* and his companions, then our justices of the Bench, impleaded *Richard Fenn*, late of, &c. declaring in the same plea against him, *For that whereas* (here set forth the whole declaration); and therefore he brought suit, &c. And afterwards, to wit, in that very same term, in the year aforesaid, the same *Richard* in his proper person came into our same court, and defended the wrong and injury, when, &c.; but said nothing in bar or preclusion of the said action of the said *John*, whereby the said *John* remained therein undefended against the said *Richard*; and such proceedings were thereupon had in our said court, that the said *John* ought to recover his damages, by occasion of the premises; but because it was unknown to our said court, what damages the said *John* had sustained by occasion of the premises aforesaid, it was commanded, to the then sheriff, That by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the said *John* had sustained, as well by occasion of the premises, as for his costs and charges by him about his suit in that behalf expended; and that he should send the inquisition which he should thereupon take, to our justices at *Westminster*, on the morrow of *All Souls*, under his seal, and the seals

If defendant dies after inquiry executed, and before return.

Sci. fa. against an administrator after an interlocutory judgment, and before inquiry.

Revolving Judgments.

of those by whose oath he should take that inquisition, as by the record and proceedings thereof remaining in our same court at *Westminster* (relation being thereto had), will more fully and at large appear; yet inquisition of the said damages still remains to be made; and the said *Richard*, after interlocutory judgment had been given in form aforesaid, and before the return of the said writ of inquiry, by us to the said sheriff, sent as aforesaid, for the purpose aforesaid, died intestate, and administration of all and singular the goods, chattels, and credits of the said *Richard* have been granted to *Mary Fenn*, the widow and relict of the said *Richard*, as we have been given to understand and be informed; and because we are willing that those things which in our said court be rightly done and transacted, We command you, That by good and lawful men of your bailiwick, you make known to the said *Mary Fenn*, administratrix as aforesaid, that she be before our justices at *Westminster*, in, &c. to shew if she has or knows of any thing to say for herself, why the damages in the said action should not be assessed to the said *John* against her, according to the form of the statute in such case made and provided, if it shall seem expedient for him so to do; and further to do and receive what our said court shall then and there consider of him in this behalf, and have you there the names of them by whom you shall so make known to her, and this writ. Witness *Alexander* Lord *Loughborough*, at *Westminster*, the 9th day of *July*, in the twenty-third year of our reign.

Proceedings against Bail.

BY the terms of the recognizance of bail, they undertake to render the defendant at the end of the suit, or pay the condemnation money; therefore if neither are done, you may

may proceed to charge the bail, either by bringing an *action* on the *recognizance*, or by *scire facias*; but before any proceedings are had, either by action or *sci. fa.* a *capias ad satisfaciendum* must be sued out against the principal, and which must be directed to, and left with the *sheriff* of the county, where the *action* is laid, for a return of *non est inventus* in his office, *four days exclusive* of the return, *Barnes* 64; the bail not being bound to render the principal, until they know what execution the plaintiff chuses to take out; and such *ca. fa.* should have *fifteen days* between the *teste* and return. *Ibid.* 176. *Stat.* 13 *Car.* 2. c. 2. Fifteen days between the teste and return of ca. fi

If an action of debt be brought on the *recognizance* of bail, the writ must be served *four days* before the return, and the bail may surrender the principal on the *quarto die post* of the return, *sedente curia*, but not after the court is risen. *Rep. & Cas. Pract. C. B.* 18. *Barnes* 82. If by attachment of privilege, it being an original writ, must have fifteen days. *Vide Stat.* 13 *Car.* 2. *st.* 2. *f.* 7. If action on the recognizance, writ be served *four days* before the return.

A *ca. fa.* returnable at a time when a writ of error is depending, is not a sufficient foundation to proceed against the bail. *Barnes* 83.

The filacer in this court takes care to enter up all recognizances of bail, and therefore if you bring an action against the bail, speak to him to get the roll carried in and filed, and the *capias* will be a common one, except that you put an *ac-etiam* in this manner, "And also that the said Richard and Thomas answer the said John in a plea of debt upon recognizance, according to the custom of

"our court of Common Bench," or if you sue out a common *capias* only, then you may indorse upon the copy, that it is an action against the defendant upon the recognizance of bail. The other part of the proceedings are just the same as in other cases; and with regard to the *venue*, it has been held, "That if a recognizance of bail be taken in *Serjeant's Inn, Fleet-street*, the *venue* may be laid in *London*." *Hob.* 195.; but where taken in any other county, the *sci. fa.* may be in the county where taken, or in *Middlesex*. *Co.* 31. 2. *Barn.* 74. 167.; but where the bail is indorled as taken in *Middlesex*, there the *sci. fa.* must be brought, and so must the *venue* be laid, in the action upon the recognizance. 2 *Black. Rep.* 769.

How to proceed by *sci. fa.*

The filacer, upon being spoke to, will enter up the recognizance of bail, and docket the roll; and after the *ca. fa.* is returned by the sheriff, he will make out the first *sci. fa.* (*tho' for expedition you may make out same yourself*); ingross it on a 2s. 6d. stamp parchment, pay him signing 2s. 6d. seal 7d. and if you mean to give notice to the bail, take it to the sheriff's office, and get a summons thereon to your officer, pay 2s. 4d. officer for summoning, 5s. each bail; when returnable, call on sheriff for same; and if he returns a *sci. fa.* thereon, go to the prothonotaries, and enter the same on their remembrance-roll, and they will give a rule for the defendants to appear, pay 2s.; the clerk will at the same time give you a roll to enter the *sci. fa.* and judgment thereon complete, which being done, and the rule ex-

Proceedings against Bail.

pired, if no appearance entered with the prothonotaries, the clerk will sign judgment; pay him 8*d.* *per sheet*; file the writ with the *custos brevium*, pay 4*d.* and then you may take out execution.

The *sci. fa.* if taken in London, or any other county (although it is inrolled in Middlesex), may be either in the county where taken, or in Middlesex; but if taken in Middlesex, it must be brought in that county only. *Barnes* 97. Into what county it is to issue.

But if you do not chuse to give the bail notice, then the first *sci. fa.* being returned *nihil*, and entered, you are to sue out an *alias* yourself, which is an exact copy of the first (except the words being added), “*as before we have commanded you,*” the *teste* of it is to be on the *quarto die post* of the return of the first, which is to be signed by the prothonotaries, pay 2*s.* seal 7*d.*; sheriff for return of *nihil* 2*s.* And note, There does not need to be fifteen days between the *teste* and return of each *sci. fa.* but only fifteen days between the *teste* of the first and return of the second. *Rep. & Cas. Pract. C. P.* 114. 2 *Black. Rep.* 922. Second *sci. fa.* *Teste* and *return*.

When it is returnable, get it from the sheriff, and take it to the prothonotaries office, enter it on the remembrance-roll, and the clerk will give rule as before.

It will be almost impossible to have two *sci. fa.* in this court returnable in one term; therefore enter on the roll the first *sci. fa.* with the award of the *second*, to the return day; which you will docket of the term the first is returnable; and on the roll on which

you sign judgment being on the second *sci. fa.* the first *sci. fa.* is recited, the award and return of the sheriff to the second, with the judgment complete.

How long to
lie in sheriff's
office.

If a *sci. feci* is to be returned on the first *sci. fa.* it must be four days in the sheriff's office (exclusive of the return-day), and so must the *alias sci. fa.* (although a *nil* be returned).

*Entry of Recognizance of
Bail in debt.*

Middlesex, (fl.) The sheriff was commanded, that he should take *John Fell*, late of *London*, Vintner, if he should be found in his bailiwick, and him safely keep, so that he should have his body before the justices of the Lord the King at *Westminster*, on the morrow of the *Holy Trinity*, to answer *William Read*, in a plea, wherefore, with force and arms the close of the said *William*, at *Westminster*, he broke, &c. and other wrongs, &c. to the great damage, &c. and against the peace, &c.; and also in a certain plea of debt upon demand for 145*l.* Afterwards, to wit, on the 24th day of *June*, in this same term, *Edward Legg*, of *Lothbury*, *London*, ho-

The like in Case.

Middlesex, (fl.) The sheriff was commanded, That he should take *Thomas Lee*, late of *Westminster*, in the said county, smith, if he should be found in his bailiwick, and him safely keep, so that he might have his body here on this day, to wit, from the day of *Easter* in five weeks, to answer to *Henry Bridges*, in a plea, wherefore, with force and arms the close of the said *Henry* at *Westminster*, he broke, and other wrongs, &c. to the great damage, &c. and against the peace, &c.; and also in a certain plea of trespass on the case, upon promises, to the damage of the said *Henry* of 103*l.* And now here, on this day comes *Thomas Lime*, of the *Strand*,

fier, and *Thomas Flem-* *Strand*, in the county of
ming, of the same place,
 plaisterer, came person- *Middlesex*, hofier, and
 ally before *Alexander Lord* *Richard Frame*, of the
Loughborough, and his same place, ironmonger,
 companions, justices of in their proper persons,
 the Lord the King of before *Alexander Lord*
 the Bench here, and his *Loughborough* and his
 acknowledged themselves, companions, justices of
 and each of them did ac- the Bench here; and
 knowledge himself, to acknowledge, and each
 owe to the said *William* of them acknowledgeth,
Read the sum of 90*l.*; that they owe to the said
 which said sum of 90*l.* *Henry* the sum of 102*l.*
 they, the said *Edward* 17*s.*; which said sum of
Legg and *Thomas Flem-* 102*l.* 17*s.* the said *Tho-*
ming, for themselves and *mas Lime* and *Richard*
 their heirs, have con- *Frame*, for themselves,
 sented and granted, and and their heirs, have
 each of them for himself, consented and granted,
 and his heirs, hath con- and each of them, for
 sented and granted, shall himself and his heirs, hath
 be made of their and each consented and granted,
 of their lands and chat- shall be made of their
 tels, and to the use and and each of their lands
 behoof of the said *Willi-* and chattels, &c. and to
am Read ("and also at the use and behoof of
 "the same time the said the said *Henry*, be le-
 " *John Fell* came person- vied ("and also at the
 " ally before the same If defendant be
 " justices, and acknow- " same time the said *Tho-* present.
 " ledged to owe to the " *mas Lee* came person-
 " said *William* the sum " ally before the same
 " of 180*l.*; which said " justices, and acknow-
 " sum of 180*l.* he the said " ledged to owe to the
 " *John*, for himself and " said *Henry* the sum of
 " his heirs, willed and which
 " granted, should be " said sum of
 " made of his lands and the said *Thomas*
 " chattels"), be levied: " *Lee*, for himself and
 " *Upon condition*, that if " his heirs, willed and
 " granted, should be
 " made of his lands and
 " chattels")

Proceedings against Bail.

judgment shall happen in the same court here, in the said plea, to be given for the said *William* against the said *John*; then the said *John* shall satisfy the debt aforesaid, and all such damages, which shall be adjudged unto the said *William* against the said *John*, in the same court here, in the plea aforesaid, or shall render his body to the prison of the *Fleet*, &c.

“chattels, and to the use of the said *Henry* “be levied”): Upon this condition, that if judgment shall happen in the same court here, in the said plea, to be given for the said *Henry* against the said *Thomas*, then the said *Thomas* shall satisfy all the damages which shall be adjudged to the said *Henry* against the said *Thomas*, in the same court here, in the plea aforesaid, or shall render his body to the prison of the *Fleet*, &c.

Sci. fa. in debt upon recognizance of bail.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: *Whereas Edward Legg*, of *Lothbury*, *London*, hofier, and *Thomas Flemming*, of the same place, plaisterer, lately in our court (to wit) in the term of the *Holy Trinity* in the 23d year of our reign, came before *Alexander Lord Loughborough* and his companions, our justices of the Bench, at *Westminster*, in their proper persons, and acknowledged themselves, and each of them did acknowledge himself to owe to *William Read* the sum

The like in case.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: *Whereas Thomas Lime*, of the *Strand*, in the county of *Middlesex*, hofier, and *Richard Frame*, of the same place, ironmonger, lately in our court, to wit, in the term of the *Holy Trinity*, in the twenty-third year of our reign, came before *Alexander Lord Loughborough* and his companions, our justices of the Bench, at *Westminster*, in their proper persons, and acknowledged, and each of them acknowledged to owe to *Henry*

sum of 90*l.* ; which said sum of 90*l.* they the said *Edward Legg* and *Thomas Flemming*, for themselves and their heirs, consented and granted, and each of them for himself and his heirs did consent and grant, should be made of their and each of their lands and chattels, and to the use and behoof of the said *William Read* be levied ; Upon this condition, that if judgment should happen in our court of the Bench aforesaid, in a certain plea of debt upon demand, for 145*l.* to be given for the said *William*, against *John Fell*, late of *London*, vintner, by the said *William Read* in our court prosecuted, then the said *John* should satisfy the debt aforesaid, and all such damages as should be adjudged unto the said *William* against the said *John*, in our same court here, or should render his body to the prison of the *Fleet* : And although the said *William* afterwards, to wit, in that same term, before *Alexander Lord Loughborough* and his companions, our justices of the Bench at *West-*

Henry Bridges the sum of 102*l.* 17*s.* ; which said sum of 102*l.* 17*s.* the said *Thomas Lime* and *Richard Frame*, for themselves and their heirs, had consented and granted, and each of them for himself and his heirs, had consented and granted, should be made of their and each of their lands and chattels, and to the use and behoof of the said *Henry* be levied ; Upon this condition, that if judgment should happen in our court of the Bench aforesaid, in a certain plea of trespass on the case, upon promises, to the damage of the said *Henry* of 150*l.* to be given for the said *Henry*, against *Thomas Lee*, late of *Westminster*, in the said county, smith, then the said *Thomas* should satisfy all the damages which should be adjudged to the said *Henry*, against the said *Thomas*, in our same court, in the plea aforesaid, or should render his body to the prison of the *Fleet* : And although the said *Henry* afterwards, to wit, in the said term, in the twenty-third year aforesaid, before *Alexan-*
der

Westminster, by the consideration of the same court, recovered against the said *John* in the said plea, the aforesaid debt of 145*l.* and also 7*l.* 10*s.* which in our said court were adjudged to the said *William*, for his damages which he had sustained by reason of the detaining that debt whereof the said *John* is convicted, as by the record and procees thereof manifestly appear. Nevertheless, the said *John* the debt and damages aforesaid to the said *William* hath not satisfied, nor his body, on the occasion aforesaid, to the prison of the *Fleet* rendered, according to the form of the recognizance aforesaid, as on the information of the said *William* we are given to understand: And because we are willing that those things which in our same court are rightly done and recognized, should be duly carried into execution, we command you, that by honest and lawful men of your bailiwick, you make known to the said *Edward Flemming* and *Thomas Legg*, that they be before our justices at *Westminster*, in fifteen days of *Saint Martin*, to shew if they have or know any thing to say for themselves (that is to say), the said *Edward Flemming*, why the said 90*l.* by him in form aforesaid acknowledged, should not be made of his lands and chattels; and the said *Richard Frame* why the said 90*l.* by him in form aforesaid acknowledged

der Lord *Loughborough* and his companions, our justices of the Bench at *Westminster*, by the consideration of the same court, recovered against the said *Thomas Lee*, in the said plea, 100*l.* which in our said court were adjudged to the said *Thomas*, for his damages which he had sustained, by reason of the not performing certain promites and undertakings made by the said *Thomas* to the said *Henry*, whereof the said *Thomas* is convicted, as by the record and procees thereof manifestly appear. Nevertheless, the said *Thomas* the damages aforesaid hath not satisfied, nor his body, on the occasion aforesaid, to the said prison of the *Fleet* rendered, &c.

acknowledged, should not be made of his lands and chattels, and to the use and behoof of the said *William* levied, according to the form and effect of the said recognizance, if to him it shall seem expedient: And have you there the names of those by whom you shall make known to them, and this writ. *Witness, &c.*

If the bail appear, make a *præcipe* for the prothonotaries thus:

Middlesex, to wit. Appearance for *Edmund Legg* *Præcipe* for and *Thomas Flemming*, bail of *John Fell*, at *Wil-* appearance to *liam Read*, to a *sci. fa.* returnable on the morrow the *sci. fa.* of *All Souls*; pay entry 3s. 10d. This is frequently done after the bail are fixed, to get a term; but they are not liable to costs unless they plead. 8 & 9 *W.* 3. c. 10. s. 3.

When the bail have appeared, deliver a declaration upon treble penny stamp paper; give a rule to plead, and demand plea as in other cases; and if the declaration is not delivered *four days exclusive* before the end of the term, they will be intitled to an imparlance. If appearance entered, how to proceed.

Middlesex, to wit. It was commanded to the Sheriff, Whereas (to the end of the entry of the roll on the second *f.i. fa.*), as far as the Sheriff's return, then say, And upon this the said *William* prayeth execution to be adjudged to him of the debt and damages aforesaid, according to the form and effect of the said recognizance, &c. Declaration.

N. B. The declaration may be entitled as *How to title* of the term generally, although the *sci. fa.* declaration. was returnable the last return of the term. 3 *Wils.* 154.

The bail may plead, that no *ca. fa.* ever *What bail* issued against the defendant, *secundum cursum* may plead, *curiæ*, *Lutw.* 1285.; that the principal died *and what not.* be-

before a *ca. sa.* returned, *Roll. Abr.* 336.; that the plaintiff had other execution against him; that the defendant paid the money recovered, 1 *Roll.* 336. l. 35. 4 & 5 *Ann. c.* 16. s. 12.; or that the principal surrendered himself, 3 *Lew.* 152.; but they cannot plead that the principal died before the return of the *sci. fa.* because if he died on the day of the return of the *ca. sa.* the bail are liable. 1 *Roll.* 336. 2 *Wils.* 67. They may plead *nul tiel record*, *Thom. Ent.* 285. *Thef. Brèv.* 265. or a release to the defendant, 1 *Roll.* 336. l. 35. "

If there be error brought by the principal, which is afterwards nonprossed with costs, yet the bail in the original action are not liable to the costs in error, but only the damages recovered in the original action, because they only became bound in that action.

Ca. sa. against bail in debt.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: We command you, That you take *Edward Legg*, late of *Lechbury*, *London*, hofier, and *Thomas Fleming*, late of the same place, plaintiff, bail of *John Fell*, late of *London*, vintner, if they be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at *Westminster*, in eight days of Saint Hilary, to satisfy
Wil-

The like in case.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: We command you, That you take *Thomas Lime*, of, &c. hofier, and *Richard Frame*, of the same place, ironmonger, bail of *Thomas Lee*, late of *Westminster*, in your county, smith, if they be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at *Westminster*, in eight days of Saint Hilary, to satisfy
Henry

William Read, 90*l.* and 90*l.*; which several sums they the said *Edward Legg*, and *Thomas Fleming*, heretofore, to wit, in the term of the *Holy Trinity*, in the twenty-third year of our reign, before *Alexander Lord Loughborough*, and his companions, then our justices of the Bench at *Westminster*, severally acknowledged to owe to the said *William Read*, to be made of their and each of their lands and chattels, and to the use and behoof of the said *William Read* be levied, in a certain plea of debt upon demand for 145*l.* against the said *John Fell*, in our same court prosecuted;

Henry Bridges, 102*l.* 17*s.* and 102*l.* 17*s.*; which several sums they the said *Thomas* and *Richard* heretofore, to wit, in the term of the *Holy Trinity*, in the twenty-third year of our reign, before *Alexander Lord Loughborough* and his companions, then our justices of the Bench at *Westminster*, severally acknowledged to owe to the said *Henry*, to be made of their and each of their lands and chattels, and to the use and behoof of the said *Henry*, be levied in a certain plea of trespass on the case upon promises, to the damage of the said *Henry* of 150*l.* against the said *Thomas Lee*, in our same court prosecuted;

And whereof the said *John Fell* was convicted, as by the record and proceedings thereon in our same court, before our said justices at *Westminster* aforesaid, remaining, manifestly appears: And whereupon it is considered in our same court, That the said *William* have his execution against the aforesaid *Edward Legg* and *Thomas Fleming*, of the said several sums of 90*l.* and 90*l.* by them in form aforesaid acknowledged, by the default of the said *Edward* and *Thomas*; and have there this writ. Witnesses *Alexander Lord Loughborough*, &c.

To be signed by the prothonotaries, pay 4*d.* seal. 7*d.* warrant 2*s.* 4*d.* and to be ingrossed upon a 2*s.* 6*d.* stamp parchment.

Testatum.

If a *testatum* say, after the words, “by the default of the said *Edward* and *Thomas*, “And “whereupon our sheriff of *Middlesex* sent to our justices at *Westminster*, at a certain day now past, that “the said *Edward* and *Thomas* were not, nor was “either of them found in his bailiwick; whereas it is “testified in our same court, that the said *Edward* and “*Thomas* lurk and secrete themselves in your county, “and have there,” &c.

N. B. I should advise the *ca. sa.* to be sued out, with the *testatum* in this case.

Fi. sa. against
the bail in
debt.

George, &c. to the sheriff of *Middlesex*, greeting: We command you, that of the lands and chattels in your bailiwick, of *Edward Legg*, late of, &c. hofier, *gol.* and of the lands and chattels in your bailiwick, of *Thomas Fleming*, *gol.* which said several sums they the said *Edward Legg* and *Thomas Fleming*, heretofore, to wit, in the term of the *Hely Trinity*, in the twenty-third year of our reign, before *Alexander Lord Loughborough* and his companions, then our justices of the bench at *Westminster*, severally acknowledged to owe to *William Read*, to be made of their, and each of their lands and chattels, and to the use and behoof the said *William* be levied, in a certain plea of a debt* upon demand for 145*l.* against *John Fell*, late of, *intner*, in our same court prosecuted; and whereof the said *John Fell* was convicted, as by the record and proceedings thereon in our same court, before our said justices, at *Westminster* aforesaid, remaining, manifestly appear; and whereupon it is considered in our same court, that the said *William* have his execution against the aforesaid *Edward Legg* and

* **Trespass** on
the case to the
damage
the said *Wil-*
liam of 145*l.*

and *Thomas Fleming*, of the said several sums of 90*l.* and 90*l.* by them in form aforesaid acknowledged, by the default of the said *Edward* and *Thomas*, whereof the said *Edward* and *Thomas* are convicted; and have that money before our justices at *Westminster*, in eight days of *Saint Hilary*, to render to the said *William* for the debt aforesaid, according to the form of the said recognizance; and have there this writ. *Witness, &c.*

In an action of trespass and assault to the damage of 500*l.* Mr. Justice *Portescue* had ordered bail for 140*l.* and the defendant being present at the time the recognizance of bail was taken; his bail were bound jointly and severally in 140*l.* plaintiff recovered a verdict for 300*l.* and the bail moved to stay proceedings against them both on their payment of 140*l.*; and upon shewing cause, the court were of opinion, that as the damages in the writ were laid 500*l.* here is no fraud upon the bail, the recognizance is separate as well as joint, and in its nature a judgment, the award of the court thereupon is, that the plaintiff have execution; therefore so far as the penalty of such recognizance will go, it is just and equitable the same be applied towards satisfaction of the condemnation money, for payment whereof, and not of any particular sum, the condition is. *Barnes* 76.

Each of the bail are liable to pay the whole penalty of the recognizance, if not more than the sum recovered.

Haydon was sued in covenant; the father became bail for him; after which a compromise took place, in pursuance of which the father paid 260*l.* and the son to have three years and an half to pay the residue. The defendant then filed a bill in Chancery, and

When proceedings are staid for a time certain above a year, proceedings may go on at the expiration

ob-

of the time,
without a
term's notice.

obtained an injunction, which was afterwards dissolved, and then a *ca. fa.* was taken out against defendant; and two *sci. fa.*'s against bail, and a *fi. fa.* against the father. Upon motion to set aside the proceedings against the bail as irregular, no proceeding having been had for upwards of three years till suing out *ca. fa.* and *sci. fa.* alledging that there ought to have been a term's notice; the court held, that as in this case it appeared that the bail was the principal agent, and consant of the whole transaction, it was no surprize on him; and that an argument to stay proceedings for a limited time, to enable the defendant to pay the debt, on default of which the plaintiff was to proceed, was in its nature an exception out of the rule, *E. 13 Geo. 2.*; and that at the expiration of the time, the proceedings may be renewed, without a term's notice; else it would in effect be a stay of proceedings, for a whole term, beyond the time agreed on. *2 Black. Rep. 762.*

Some notice
must be given
of suing out
sci. fa. against
the bail by
the sheriff.

Motion to stay the proceedings on a *sci. fa.* sued out against *Lowing* and *Spite*, defendant's bail, they not being served with a copy of the sheriff's warrant, which recites the writ. But the one (*viz. Lowing*), by giving him a personal summons, and reading to him the sheriff's warrant; the other, by leaving a memorandum (containing the substance of the writ) with his wife, at his house in his absence. It appeared (on enquiry of the officers), that it is usual in *Middlesex* to serve the bail with a copy of the sheriff's warrant, but not so in many other counties; and this
arose

arose in *Lincolnshire*. In some counties they give verbal notice; in some, none at all. The court held some notice should be given (*Salk.* 599.), the sufficiency of which (if disputed) must be determined by the court, on the circumstances; and that this notice was sufficient. 2 *Black. Rep.* 837.

If the bail mean to acquit themselves of their recognizance entirely, and run no hazard of the death of the defendant, then they must render him in their discharge, before the return-day of the *ca. sa.* as the death of the principal afterwards will not discharge them; but if they do not, then they have until the *quarto die post* (if proceedings are by original) *sedente curia* of the first *sci. fa.* if returned *scire feci*; but if a *nihil* is returned thereon, then until the *quarto die post* of the return of the second *sci. fa. sedente curia.* Barnes 82.

Within what time bail may render.

But if the action be by attachment of privilege, then they must render on the return of the second *sci. fa.* or the first, if returned *scire feci, sedente curia.*

And if there be an action on the recognizance, the bail may surrender the principal before; or on the appearance-day of the return of the writ (if proceedings are by original), *sedente curia*, Barnes 82. Rep. & *Cas. Pract. C. P.* 18. if by attachment on the return-day.

When to surrender on an action on recognizance.

If the defendant be in custody of any sheriff or gaoler, the bail may have a *habeas corpus* either in term or vacation, to bring him before the chief justice, or one of the other judges, up to render

If defendant in custody, bail may have a *hab. corp.* to bring him to render

Proceedings against Bail.

judges, returnable immediately, in order to render him in discharge of his bail.

If defendant is a bankrupt, may summons to discharge the bail.

If he is a bankrupt, and has his certificate, a summons to shew cause why an *exoneretur* should not be entered upon the bail-piece, should be taken out and served; and upon producing the certificate to the judge, the bail will be discharged by his order, upon affidavit of the debt having accrued due prior to the commission.

How to surrender in town.

If the defendant is in town, get the filacer (if the action be by original) to go to the judge's chambers, and take the render, pay filacer 7s. 4d. judge's clerk 13s. tipstaff 10s. 6d. The filacer brings his book, wherein the bail are rendered with him to the judge's chambers, and the judge exonerates the bail at same time. *N. B.* Notice of the surrender is requisite, but not an affidavit.

If the action be by attachment of privilege, then apply to Mr. *Underwood* to take the bail-piece to the judge's chambers, pay 7s. 4d. to him, 16s. to the judge, tipstaff 10s. 6d. and give notice of the render, and no affidavit requisite.

Notice of surrender.

Take notice that the above defendant did this day surrender himself in discharge of his bail, and was thereupon committed by the Honourable Mr. Justice *Gould*, to his Majesty's prison of the *Fleet*, there to remain until, &c. Dated, &c.

Time of surrender to be entered by the filacer.

The court ordered the hour of the day or true time of the defendant's surrender, to be entered by the filacer, in order that it might appear, whether the surrender was made before

before or after the rising of the court.

Barnes 78.

Staying proceedings against the bail where a writ of error is brought by the principal.

The allowance of a writ of error on a judgment by *nil dicit*, is so entirely a *superfedeas* to a subsequent writ of execution, and all proceedings thereon against the bail, that all may be set aside upon motion, 2 *Black. Rep.* 1183.; but no contempt is incurred till after notice to plaintiff's attorney. *Barnes* 376.

When writ of error a *superfedeas*.

In this court a writ of error is no *superfedeas* from the sealing, but from the delivery to the clerk of the errors, *Barnes* 206. 209.; and if the *ca. fa.* be returnable at a time when the writ of error is depending, cannot proceed against the bail. *Ibid* 83.

Defendant moved to stay proceedings against his bail pending a writ of error, plaintiff insisted that the bail ought to give judgment, and that execution only should stay: But *per cur.* the bail ought not to be precluded from surrendering the principal; and therefore let all proceedings be staid pending the writ of error. *Barnes* 66.

Proceedings against bail, pending a writ of error, staid.

Proceedings were staid in an action of debt, brought upon a recognizance of bail, pending a writ of error, without defendant's giving judgment, because thereby the defendant would be precluded from a surrender, which is not reasonable. *Ibid.* 68.

The like without giving judgment.

Plaintiff recovered judgment, defendant brought error, pending which, plaintiff brought an action of debt on the judgment, and after judgment thereon, levied. *Per cur.* The judgment execution, court

would not set it aside, for defendant might have applied in time.

defendant might have moved the court to stay proceedings in the action on the judgment, *pending the writ of error*, which is always granted; but having made no such application, judgment regular. *Barnes* 202, 203.

Bail to an action upon a judgment; judgment against defendant, and writ against bail before the return, proceedings against bail staid, pending error to reverse the first judgment, they consenting to give judgment.

Plaintiff brought an action on the case against defendant, who appeared, and plaintiff recovered judgment, and then brought debt on the judgment, and held defendant to bail, and recovered a second judgment. After a *ca. sa.* returned against the principal, and before the return of the writ, in an action of debt upon the recognizance, against the bail in the second action, the court was moved to stay the proceedings on the recognizance, pending a writ of error, to reverse the first judgment; and upon the bail's consenting to give judgment in the actions brought against them, the rule to stay proceedings was made absolute. *Barnes* 86.

Error brought in time, and the bail sued, proceedings staid.

If the writ of error be not brought in time, and the bail be sued, the court will not let proceedings be staid, unless they give judgment in the actions against them, and undertake to render the defendant *within four days* after the affirmance of the judgment.

Pending error cannot have an exigent *post ca. sa.*

The plaintiff, pending a writ of error, cannot have an exigent *post ca. sa.* on the original judgment. *Sprinks v. Bird. Barnes* 314.

If error abate by death of chief justice, execution may be had with leave of the court.

If a writ of error be brought on a judgment in this court, and the chief justice dies, (before he has returned the writ of error), whereby the writ is abated, execution may be taken out without leave of the court; but if

if taken out without leave, it will be set aside, and restitution ordered. *Granburne v. Quenel. Thornton & Hay's Pract. Reg. C. P. 195. Barnes 201.*

Nonpros for not Declaring.

By rule *Hil. 9 Ann. reg. 3.* It is ordered, "That upon all process returnable the first or any other return in any term, the plaintiff shall have liberty to the end of the next ensuing term, to deliver his declaration to the defendant's attorney, or of leaving the same in the office; and the defendant's attorney having entered his appearance with the proper officer, as of that term in which the process is returnable, and at the end of the ensuing term, or in *four days* after the end thereof, having given a rule to declare in the proper office, and having called on the plaintiff's attorney (if he can be found), the defendant, any time in the *vacation* of such ensuing term after the rule for declaring is out, may sign his *nonpros* for want of a *declaration*, and not afterwards, and the plaintiff shall not, without the leave of the court, have any longer time to declare in, other than the time to be limited by the defendant's rule."

In what time a non pros may be signed for want of a declaration.

But where the defendant, at the end of the second term, does not give a rule for the plaintiff to declare, he has till the *essex day* of the *third term*, to deliver or file his declaration. *Rep. & Cas. Pract. C. P. 12. Pract. Reg. C. P. f. 121.*

No rule being given, plaintiff has till the essex day of the 3d term to declare.

If the defendant wishes to compel the plaintiff to declare, he may give a rule with the secondary for that purpose, after the end of the second term, and *within four days*, which expires in *four days* after, pay 1s. 10d. and demand a declaration of plaintiff's attorney, and for want thereof sign judgment.

How to compel plaintiff to declare.

The rule.

In the Common Pleas,

Denn v. Fenn. Rule to declare.

Demand

Denn v Fenn. The Defendant demands a declaration in this cause by yours, &c.

C. K. Defendant's Attorney.

A demand of declaration must be made on the agent in town, and not of country attorney. *Barnes* 311.

May have farther time by sale.

If the plaintiff should not be able to declare within the time limited, he may, on the last day of the second term, get a *subpoena* rule from the secondaries, for further time, till the first day of the next term, pay 4s. serve copy on defendant's attorney, or if he waits for a rule, the plaintiff's attorney may take out a judge's summons for that purpose, serve it, and on attendance the judge will grant him an order thereon, pay 2s.

If writ is joint, and separate appearance, cannot sign several nonpros's.

If the writ is joint, and the appearance several, the plaintiff cannot sign several *nonpros's*, as there ought to be but one. *Comyns* 744 *Walk.* 455.

Cannot nonsuit plaintiff for not declaring after removal by *habeas corpus*.

If defendant removes the cause by *habeas corpus*, he cannot nonsuit the plaintiff for not declaring, as the plaintiff is not bound to follow him but he must declare within two terms after the removal.

How to sign nonpros.

Enter on a double half crown stamp paper the *nonpros*, file defendant's warrant of attorney with the clerk of the warrants, who will mark the judgment-paper, pay 8d. take it to prothonotaries, pay 7s. 4d. for signing.

Entry of a *nonpros* for no declaring.

Middlesex, (B.) Richard Fenn, who sued out his Majesty's writ against John Denn, late of, &c. of a plea of trespass, doth not further prosecute the same: Therefore it is considered by the court, that he and his pledges for the prosecution be in mercy, &c. The names of the pledges are John Doe and Richard Roe, and the said John is thereupon from hence for ever discharged without a day, &c. It is also considered, that the said John recover against the said Richard 93s. 4d. by the discretion of the justices of the Lord the King here, according to the form of the statute,

Nonpros for not Replanning.

in such case made and provided, at his request adjudged to him, for his costs and charges sustained by him about his defence in this behalf, &c. *N B* 33s. 4d are the common costs allowed; if you have any *extra's*, such as bail above, &c. the prothonotaries will tax the costs, and the above form will suit aailable action, and an action can be maintained in this court on the judgment. *Cro. Eliz* 96 1 *Wils* 316.

Nonpros for not Replanning, &c.

THE plaintiff may be nonprossed at any stage of the suit for not complying with the rules of the court, viz. for not replying to the defendant's plea,

for coming to his rejoinder, not entering the issue, when served with a rule for that purpose, which is a final judgment, and signed on a double 2s 6d stamp paper (for the costs of these judgments, see title Judgment) *N B* the defendant's warrant of attorney must be filed, and there is only in *incuritur* of the action first entered on the judgment paper, for a warrant the prothonotaries clerk to sign it.

To compel the plaintiff to reply, a rule is given with the *juris*, same as a rule to plead, pay 1s 10d to the defendant to rejoin, and to the plaintiff to furnish out to enter the issue, a rule is obtained for that purpose, pay 4s 6d serve copy, and before *nonpros* is signed, a demand in writing must be made of the *repl. a. ion*, *rejoinder*, &c.

If the defendant sever in their plea, the plaintiff may, at any time, before the record is set down for trial, enter a nonpros against one or more of them *Salk.* 457.

In assumpsit against two partners, one pleads judgment recovered against both, the other pleads bankruptcy, plaintiff replies *nul tuel record* to the plea of judgment recovered, and upon issue, judgment was given against him, and a writ of inquiry of damages awarded and final judgment. Upon the bankruptcy

destroy the ac-
tion as to the
other.

issue is also joined, whereupon the plaintiff entred a *nolle prosequi*, that he would not further proceed as to the issue joined between him and the bankrupt, and upon error being brought, it was held well, and the judgment was affirmed; and *Dennison* J. said, That the plea of bankruptcy is not a plea to the action, but only a personal discharge; but that if one defendant was to plead a plea that was to go to the action, he thought it might then have a different consideration; for the *Stat. 10 Ann c 15* hath made the partner (not a bankrupt) liable for the whole debt. 1 *Wils. 89. Salk. 457.*

Proceedings by Attornies.

IF an attorney sues by original, he waives his privilege; or if he sues in another's name, he does the same. Therefore, if he means to sue as a privileged person, the first process is an attachment, which must have *fifteen days* between the *teste* and *return*, it being in the nature of an original writ; and a *præcipe* must be left with the prothonotaries at the time of signing, pursuant to *R. H. 11 Geo. 2. reg. 2* or it may be quashed, 2 *Black Rep. 919.* and it is of no force, unless signed by the clerk of the *warrant* before sealed. *R. Tim. 29 Car 2. T. 9 W. 3.*

Attachment of
privilege.

It is no
action to be
pursued this writ
if you be de-
fendant to it, it
expresses the na-
ture of the ac-
tion as to a plea
of debt, the party
in the case, &c.

George the Third, &c. To the Sheriff of *Middlesex*, greeting. Attach *Richard Fenn* to that you may have him before our justices at *Westminster*, on *Thursday* next after the morrow of *All Souls*, to answer *John Denn*, Gentleman, one of the attornies of the court of the Bench, according to the liberties and privileges of the same court, for such attornies and other ministers of the same bench, from time out of mind, used and approved of in the same, of a plea of trespass * (as the action is) and have you there this writ, witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the 23d year of our reign.

J. Denn in person, 26th *Aug* 1783.
Indorse

Proceedings by Attornies.

Indorse the sum sworn to (if bailable), and the attorney's name who sues out the writ, and the year and day it is signed, a *præcipe* is to be made in this manner

" *Middlesex*, attachment of privilege for *John* Præcipe.
 " *Denn*, Gnt one, &c against *Richard Fenn*, case
 " return ble on *Thursday* next, at the morrow of
 " *All Souls* *Denn* n p r n. Affix it for 42l "

Take the *præcipe* and writ to the prothonotaries clerk, who will fill the writ, and keep the *præcipe*; pay nothing for him. Get a mark on the clerk of the warrants before it is sealed, pay nothing, unless in arrear for term fees, sealing 1d. If the attachment is not bailable, a copy must be served on defendant, with an English notice as for a *captas* but if bailable, you must apply to the sheriff for a warrant, pay 4d. in *Middlesex*.

Common Appearance, and putting in Bail.

IF the attachment requires only a common ap- How to appear.
 pearance, it must be entred with the prothonotaries, a *præcipe* is required, pay 3s. 10d and if it requires special bail, Mr. Underwood prepares the bail-piece (or you may prepare it yourself), which is done on a 2s. stamp parchment, the form of which is as follows. Mr. Underwood

Trinity Term 23 Geo 3^d
Middlesex, Attachment of privilege for J^r B. gentleman, one,
 &c against J^r S., in a plea of treple on the case. — Bail
 for 27^l 13s 6d

Returnable on *Thursday* next after the morrow of *All Souls*
 The bail are J^r D. of, & Glover, and J^r G. of,
 &c broker

Each of the bail in 55^l 7s.

S^r T. Defendant's Attorney

Bail in double the sum sworn to, if principal does not appear
 If he does, then in the sum sworn to.

Bail piece for attachment of privilege.

Proceedings by Attornies.

attends the judge, or the court when the recognizance of bail is entred into, and the bail justity, or fresh bail is added, in the same manner as the filacer does on meine procs. Give notice in the same manner of being put in, exception and justification, those forms will do for this; pay Mr Underwood 7s 4d

Declaration.

The declaration is to be ingrossed on treble 1d. stamp paper, the form of which is as follows,

Declaration at
the suit of an
attorney.

Middlesex, (to wit,) *Richard Fen*, late of *Westminster*, in the said county, plumber, was attached by a writ of privilege issuing out of the court here, to answer to *John Denn*, gentleman, one of the attornies of the court of our Lord the King of the Bench here, according to the liberties and privileges for such attornies, and other ministers of the same Bench, time out of mind, used and approved of in the same, of a plea of trespass on the case, &c. And whereupon the said *John Denn*, in his proper person complains *That whereas*, (the rest as in common cases) only you must add pledges to prosecute.

When defendant
must plead.

If an attorney delivers or files his declaration, and gives notice thereof *four days exclusive* of the end of the term in which the process is returnable, the defendant must plead the same term, if rule to plead be given, and plea demanded

And the proceedings upon attachment of privilege is with respect to delivery of the declaration and rule to plead, in the same manner as by original. And if an enquiry is executed, the form only differs in this.

George the Third, To the Sheriff of *Middlesex*, greeting. Whereas *Rudolf Penn*, late of, &c. was attached by our writ of privilege issuing out of our court here, to be before our justices at *Westminster*, to answer *John Denn*, one of the attornies, &c. (the same as in the declaration) in a plea, *For that whereas* (here set forth the whole declaration), to the said *John Denn*, his damage of ten pounds, as it is said, and it was in such manner pro-

proceeded in our said court of the Bench, that (here go on as in a common inquiry, making the writ returnable on a day certain, instead of a general return day).

George the Third, &c. To the sheriff of Middlesex, greeting. Attach Richard Fenn, (so that you may have him before our justices at Westminster, on Thursday next after the morrow of All Souls, to satisfy John Dinn, gentleman, one of the attornies of our court of the Bench here, 5*l.* which were adjudged to the said John, in our said court, before our justices at Westminster, for his damages, which he had sustained, by occasion of a certain trespass on the case, done to the said John at Westminster, in your county, whereof he is convicted, and have there this writ. Witness, &c. Pay signing at prothonotaries 4*d* seal 7*d*.

An attorney having sued by his attachment of privilege, was nontuited and taken in execution for the costs upon a *ca. sa.* returnable on a general return, and held well enough, for the plaintiff had no day in court. 3 *Hils.* 58.; nor can any advantage be taken of irregularity of process without having it returned, and before the court, and the court would not have made a rule for that purpose. *Had per Rates just.*

An attorney taken up on a *ca. sa.* upon a nonuit for costs returnable on a general return, held well.

That an attorney of this court may for a debt *bona fide* (but not a note colourably inserted without a consideration), sue an attorney of the King's Bench by attachment of privilege, and the King's Bench attorney would not be entitled to privilege. But where the attornies plaintiff and defendant are both of the same court, the proceedings must be by bill, and not by attachment, defendant being intitled to privilege. *Barnes 44.*

A torney of C P. may hold to bail an attorney of K B, but where of same court a bill must be filed.

The defendant being sued on an attachment of privilege by the plaintiff, an attorney of this court, in an action on the case, pleaded his privilege as an attorney of the King's Bench, to be sued only of that court, to which the plaintiff demurred, and defendant joined, and judgment was for plaintiff.

Where an attorney of one court sues on attorney of another, the privilege of that court which is possessed of the cause, shall be

Vide preferred.

Vide 2 *Brown* 262. Where there is privilege of one court, against privilege of another, that court which was first possessed of the cause, shall retain the jurisdiction of it. 2 *Black. Rep.* 1325.

Proceedings against Attornies.

It has been already observed, That an attorney is privileged from arrests, he always being supposed attending in court, but if an attorney of this court should be arrested on a King's Bench process, the sheriff need not discharge him on a writ of privilege, but he must sue out his writ, and produce it with his plea *sub pede sigilli*, but if on process, out of an inferior court, his writ ought to be allowed *instanter*. *Rep. & Cas. Prac. C. P.* 2.

A writ of privilege by an attorney arrested in the same court held ill, it must be pleaded

How to sue an attorney of this court,

An attorney of the B. R. arrested by *capias*, on a special original out of the same court, is not intitled to his discharge by serving the sheriff with a writ of privilege; but must plead it *sub pede sigilli*, held so on demurrer. 2 *Black. Rep.* 1085.

If an attorney be defendant, a bill must be prepared in the following form, according to the nature of the action, which is to be ingrossed on a treble 11. stamp parchment; take it to *Westminster*, and give it to one of the criers to call the defendant, pay him 1s.; he will get it signed by the prothonotary, pay 8d. per sheet for the entry, or 2s. a count. The crier then gives it you back again; annex a common bail-piece at the foot of the bill, take it to the secondaries office, who will give a rule for the defendant to appear, pay 4d., file it with the prothonotaries, pay 4d.; give notice to the defendant to appear, and if the action be laid in *London* or *Middlesex*, and defendant resides within *twenty miles* of *London*, he is to appear within four days after notice given to him, or his agent, or left at his usual place of abode; if he resides above *twenty miles* from *London*, or the action be laid in any other county than

The defendant to appear, if he lives within 20 miles of London or Middlesex, in four days.

Within what time to appear to a bill in town.

If above 20 miles from London.

Proceedings against Attornies.

523,

London or Middlesex, then eight days after such notice shall be given in such manner as aforesaid.
R. H. 11 Geo. 2. Reg 3.

If above 20 miles, 8 days, or the action be laid in another county.

In the Common Pleas.

Trinity term, in the twenty-third year of the reign of King George the Third.

To the Justices of our Lord the King of the Bench.

Middlesex, (ss) John Denn, by S. U. his attorney, complains of Richard Fenn, gentleman, one of the attornies of the court of our Lord the King of the Bench, present here in court, in his proper person, For that whereas (as in other declarations), but instead of saying, "And therefore he brings just," you say, "And therefore he prays relief," adding pledges.
John Doe and Richard Roe.

In the Common Pleas,

John Denn, plaintiff,
and

Richard Fenn, gent. one, &c defendant.

Take notice, That a bill was this day filed in the prothonotaries office, in Tanfield court, in the Inner Temple, London, against you, as of this present Trinity term, at the suit of the above plaintiff John Denn, in an action of trespass on the case, on several promises, wherein the plaintiff lays his damage to 20*l*, and unless you appear to the said bill * in four days from the date hereof, you will be forejudged the court. Dated the day of June 1783.

The form of the notice.

* Fought in the county, and above 20 miles.

Yours, &c.

S. U. Attorney for Plaintiff.

To Mr Richard Fenn,
the above defendant.

If the defendant appears, he enters it with the prothonotaries, make a note or *præcipe* for that purpose, pay 3*s* 10*d*, then the plaintiff's attorney delivers a declaration, ingrossed on treble 1*d*. stamped paper, to him or his agent, charge on the back thereof, as usual, 4*d* per sheet, and give rule to plead,

How to appear.

Proceedings against Attornies.

When to plead in town plead, and proceed as in other cases. And if the action be in *London* or *Middlesex*, and defendant lives within *twenty miles* thereof, and the declaration be delivered *four days* before the end of the term, he must plead in *four days*, if above, in *eight days*, or the venue be laid in the country.

In the country.

In the Common Pleas

Trinity Term, in the twenty third year of the reign of King *George the Third*

Declaratⁿ *Middlesex*, (ss) *Be it remembered*, That on the 20th day of *June*, in this same term, *John Denn* came here into court, by *S. U* his attorney, and exhibited to the justices of our Lord the King here, his certain bill against *Richard Fenn*, gentleman, one of the attornies of the court of our Lord the King of the Bench, present here in court, in his proper person, the tenor of which said bill follows in these words. *To the justices of our Lord the King of the Bench. Middlesex*, (ss) *Richard Fenn*, &c. so on with the bill to the end, adding pledges (*verdictum*)

The nature of the action need not be set forth in the manner in the *manuscriptum Rep. & Cas. Prae. 7. C. P. 105.*

In case the defendant does not plead, you sign judgment exactly as in other cases, and your writ of inquiry will be as follows.

Writ of inquiry *George the Third, &c.* To the Sheriff of *Middlesex*, greeting, *Whereas John Denn*, by *S. U* his attorney, came into our court, before our justices at *Westminster*, and exhibited to our said justices his bill against *Richard Fenn*, gentleman, one of the attornies of the court of the Bench, present in our said court, in his proper person, of a plea, *For that* (to the end of the declaration), to the damage of the said *John*, of *20l* as it is laid, And it was in such manner proceeded in our said court of the Bench (go on as in a common inquiry), only make the *return on a day certain*, instead of a *general return*. The prothonotaries sign the writ, seal *7d*, and to be ingrossed on a *2s 6d* stamped parchment, pay prothonotaries *1s 4d*. first count, and *8d.* each other, if a special action *quod per* direct.

If

Proceedings against ~~Unjoines~~.

527

If the defendant pleads, the issue is made on beginning with the declaration: ~~primary it is at the same term the bill is filed: if not, you must get a bill, out of the prothonotaries, the term that it is filed of; enter the declaration thereon exactly, and an imparlance over to the term the issue is to be of; pay the prothonotaries 8d. per sheet, then draw your issue, which is also entered on a roll the term in which the issue is delivered, and ingross it on a treble penny stamp paper, the form of which is as follows:~~

In the Common Pleas.

Michaelmas term, in the twenty-fourth year of the reign of King George the Third, *heretofore*, as it appears, in the term of the *Holy Trinity* last past, on the 645th roll, it is thus contained *Middlesex*, to wit, *Be it remembered* (to the end of the declaration exactly, adding pledges). The form of the issue of another term.

And the said *Richard*, in his own person, comes and defends the wrong and injury, when, &c. and prays leave to imparl thereto here, until *Thursday* next after the morrow of *All Souls*, and he hath it, &c., at which day cometh here, as well the said *John*, by his said attorney, as the said *Richard* in his own person; and the said *John* prayeth, That the said *Richard* may answer his said bill; and the said *Richard*, in his proper person as before, defends the wrong and injury, when, &c., and says, That he did not undertake, and promise, in manner and form as the said *John* hath above thereof complained against him, and of this he puts himself on the country; and the said *Richard* doth the like, &c. Therefore the sheriff is commanded, that he cause to come here, on next after twelve, &c. by whom, &c. and who neither, &c. because as well, &c. Imparlance, &c. and issue.

Charge on the back of the issue the same as in other cases; and if not paid for on demand, lien judgment; if paid for, the record is made up exactly from the issue, with one placita, leaving room for another, Record.

Proceedings against Attornies.

Ven & his corp
jurat.

Forejudger for
want of an ap-
pearance.

another, for fear it should not be tried in that term ;
~~and in the writ you can the defendant exactly as~~
~~in the pleadings, the writ, and the writs, and~~
~~for him, are to be returnable on a day certain.~~

~~If the defendant does not appear in due time, you~~
~~may then sign a forejudger against him, which~~
~~will enable you to strike him off the roll, and then~~
~~he must be sued as a common person ; and so must~~
~~other plaintiffs, and not by our get a roll at the~~
~~prothonotaries, make the entry complete thereon,~~
~~then take same to their clerk, and he will sign the~~
~~forejudger, pay 2s ; take the roll to the clerk of~~
~~the warrants, who will strike the attorney off the~~
~~roll, pay him 1s. 4d., docket the roll with the pro-~~
~~thonotaries.~~

Forejudger.

*Middlesex, to wit, Be it remembered, (here copy
the memorandum the same as to the declaration, and so
to the end of the bill filed, adding the pludges), then
say, Whereupon the said Richard being solemnly
called, came not, therefore he standeth forejudged
from exercising his office of attorney for his contu-
macy, until, &c.*

Restoring after
forejudger in va-
cation

In term it must
be done on an
affidavit in the
Treasury clamb-
bet.

It is very proper here to observe the method of
an attorney's being restored, which is, when the
attorney hath made satisfaction to the plaintiff, he
must summon the attorney before a judge, to shew
cause why he should not be restored ; and on their
attending the judge, if it appears to him that the
plaintiff hath had satisfaction, he will make an or-
der to the clerk of the warrants to replace him,
who does it without any entry. But if such attor-
ney be arrested by any other person, and he pleads
his privilege, and the plaintiff replies, that he is
forejudged, and issue be taken thereon, it is then
proper that the before entry be made ; for his being
forejudged is as much a bar, and deprives him of
his privilege, with regard to others as an outlawry,
is a bar for any other person to take advantage of,
~~as well those that are strangers, as those that are~~
~~parties to the outlawry.~~

In

In the outset of this work, it has been observed, Proceedings on attachment for contempt, that attornies are liable to be punished in a summary way, either by attachment, or having their names struck off the roll for mal-practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty, and he shall pay the costs thereupon, or shall be committed. *Sti. Prac. Reg.* 2, 3. But such attachment shall not be granted before a day allowed for cause to be shewn. *Mod. Caf.* 16. Vide *Barnes* 77.

An attorney admitted fraudulently was struck off the roll, and an attachment was granted against the master, *2 Black Rep.* 991.; and on justification of bail to an attachment, reasonable notice is sufficient, one day, if the bail live near. *Ibid.* 110.

If an attorney of this court does any thing wrong, as an attorney, in an inferior court, this court will oblige him to answer the complaint, because an attorney cannot practise in an inferior court, if he is not an attorney of a superior court. *2 Wils.* 382.

If the court is moved for an attachment against an attorney, and it is granted, then the form is as follows :

George the Third, &c. To the sheriff of Middle- Attachment.
sex, greeting. Attach *Richard Fenn*, Gentleman, To be ingrossed on a ss 6d stamp parchment, signed by prothonotaries, &c. & at the foot of it put the substance of the rule, and say, in a cause, Denee against Fenn,
one of the attornies of the court of Common Bench, Gent, one, &c.
so that you have him before our justices at *Westminster*, on *Thursday* next after the morrow of *All Souls*, to answer us, of and concerning those things which shall then on our behalf be objected to him, and have you there this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 9th day of *July*, in the 23d year of our reign.

The reason why an attachment is not to appear and make answer to the plaintiff in the cause, upon whose application such attachment was granted, but to answer us, which is to our Sovereign Lord the King, is, because it is for a contempt of the court; and the king being supposed by law to be the fountain from whom all justice flows, therefore he must answer the contempt to him, and the fine which is

imposed for such contempt is the king's, and to be effreated into his Lachequer.

If attorney is taken on an attachment, how to proceed.

Qu.

When an attorney is taken on an attachment, he gives a bail bond to the sheriff, and at the return of the writ personally appears in court, and then enters into a recognizance to appear from day to day, till the court shall determine concerning the matters objected against him. And upon motion by his counsel, the court makes a rule, that unless his adversary exhibits interrogatories against him in four days from such rule, he shall be discharged.

Interrogatories how to be prepared.

These interrogatories must be ingrossed on a double 12d. stamp parchment, and signed by a serjeant, and filed with one of the secondaries; and after such attorney hath been sworn before a judge (*a commissioner will not do*), he is examined by the secondary, who afterwards makes copies of the depositions for each party, on treble penny stamp paper, seventy-two words to a sheet, pay 11d per sheet for copy and duty: and if the petitioner, to whom the matter is generally referred, reports that he is in contempt, the court commits him to the Fleet, or if he is reported innocent, they discharge him. If he neglects to appear to be examined, or neglect attending the court when he is directed to come, the court will order his recognizance to be effreated, and if he confesses any thing material in his depositions, there is no occasion for witnesses, but you move on his confession.

In the Common Pleas,

At Michaelmas term, in the twenty-fourth year of the reign of King George the Third.

The form of the interrogatories.

Thomas Lee,
against

James Sibbs, Gent
one. &c.

Interrogatories to be administered to *James Sibbs*, of, &c. (German, one of the attornies of the court of our Lord the now King of the Bench, at *Westminster*, touching and concerning a contempt supposed to be by him committed against the said court.

Here

Here insert the interrogatories in the common form; and at the foot of them put the *jurat*. thus :
 " The above-named *James Sibbs* was sworn, the
 " day of 1783, true answer to
 " make to such questions as shall be asked him, on
 " his examination on the above interrogatories, be-
 " fore me, at my chambers, in *Serjants Inn*,
 " *Chancery Lane* "

If an attorney refuses to deliver his bill of fees to his client, signed, he may take out a summons for that purpose, before a judge, which on service, and no attendance, on the third summons, the judge, on affidavit of the attendance, will make an order, *ex parte*, to deliver same within a reasonable time; draw up order, and serve a copy, shew the original, and if he makes default on his being served, you may, on affidavit of the service of order, move for an attachment of contempt. If he delivers his bill, then you must take out a summons * to shew cause why it should not be referred to one of the prothonotaries to be taxed; serve copy, and if he does not attend on the third summons, the judge will grant an order *ex parte*, serve copy, shew the original. *N B* The client must be there, to undertake to pay what shall appear to be due on the taxation, or you must do it on your own account. When the order is drawn up, get an appointment from one of the prothonotaries; serve copy of order and appointment, and attend at the time to tax, and in case the attorney does not attend the third appointment, the prothonotary, on affidavit of *due attendance*, will tax the bill *ex parte*.

How to tax their bills.

* The summons must be to one of the causes in which he has a demand

The length of time in either court, for the taxation of an attorney's bill, is not settled after paid; but it must be within a reasonable time, and also it must appear to the judge that there are great overcharges, or he will not grant an order.

The time to tax an attorney's bill when paid, is not settled.

Proceedings against Peers and Members.

THE practice in this court hath been, to sue *peers of this realm*, as also *members of parliament*, by *original bill and summons*; therefore if either are to be sued, you draw a bill against them (ingross it on a treble *red* stamp parchment), get it signed by the prothonotaries, (pay 8*d* per sheet), file it with the filacer of the county where the *venue* is laid (pay 8*d*), make out a writ of summons, and ingross it on a 2*s* 6*d* stamp parchment pay signing 8*d*. per sheet, seal 7*d* summons from the sheriff 1*s* 4*d* officer 5*s*), if he does not appear in *four days* after the return of the writ, then you may sue out a *distringas* (pay filacer 8*d*. per sheet, seal 7*d*. warrant 2*s*. 4*d* officer for levy 10*s*).

§. 10 may be
prosecuted a
guilty persons
and the r. sero
and.

By Stat. 10 G. 3. c. 50. "Any person shall and
"may commence and prosecute any action or suit,
"in any court of record, or court of equity, or of
"a solemnity, and in all causes matrimonial and
"testamentary, against any *peer*, or *lord of parlia-*
"ment of Great Britain, or against any of the
"knights, &c. of the House of Commons of Great
"Britain, for the time being, or against their or
"any of their *relatives*, or any other person
"intituled to privilege of parliament; and no suit,
"action, &c. shall be stated, by or under colour or
"pretence of any privilege of parliament, pro-
"vided that nothing shall extend to subject the
"person of any of the *knights, citizens, and com-*
"moners of any boroughs of shires and burghs of
"the House of Commons of Great Britain, for the
"time being, to be arrested or imprisoned, upon
"any such suit or proceedings," S. 1. 2.

The person of
the r. sero
to be arrested.

The person of
the r. sero
to be arrested.

N.B. *Serjeants at law and members of parliament* are, by the act, deprived of every privilege they were intitled to from their respective lords and masters, and therefore may be prosecuted and arrested as common persons.

In the Common Pleas.

Michaelmas term, in the twenty-fourth year of the reign of King George the Third,

To the justices of our Lord the King of the Bench.

Middlex, to wit, John Denn, Esq. his attorney, complains of *Richard of V.* in a plea of trespass on the case; For that whereas (as it is commonly, according to the nature of the action), and therefore he brings his suit, &c. (as it is in the words in the common conclusion, "craftily and subtilly to contrive and defeat the said John," &c.) And hereupon the said John prays process of our Lord the King, according to the form of the statute in such case made and provided, to be made to him thereupon, and it is granted to him, &c. Pledges to prosecute, *John Doe and Richard Roe.*

The sixteen peers of Scotland, by Stat. 5 Ann. 8 have the same privilege with the peers of England &c., also all the rest of the peers of Scotland have all the privilege &c. the peers of England (except voting in parliament). 4 Bacon Ar. 229.

If defendant be a duke, describe him thus "Comes of C. D. &c. B.," and say in all the counts, "Et sit et sit" instead of "the said." In the summons and declaration, call him "C. Duke of B."

To the justices of our Lord the King of the Bench.

N. R. P. t. the
ter

Middlex, to wit, John Denn, Esq. his attorney, complains of *Richard Lion, Esq.* having privilege of parliament, in a plea to the tender to the said John 10 l. of lawful money of Great Britain, which he owes to, and unlawfully detains from him, For that &c. (as it is in the words). And therefore he brings suit, &c. And hereupon the said John prays process of our Lord the King, according to the form of the statute in such case made and provided, to be made to him thereupon. And

B. l. 4 p. 1 a
member

it is granted to him, &c. Pledges to prosecute, *John Doe* and *Richard Roe*.

N. B. Leave out the words "*craftily, &c.*" in the common conclusion.

If an Irish peer,
how to style.

If the defendant be an *Irish peer*, describe him thus: "*James Connolly, Esq; commonly called, the Right Honourable James Earl of W.;*" and instead of *James*, say, "*the said James Connolly;*" but the words, "*Having privilege of parliament,*" are not to be omitted, because the peers of that kingdom are considered only as *commoners in law*.

Summons against a Peer.

George the Third, &c.
To the Sheriff of *Middlesex*, greeting: We command you, that you summon *R. Earl of V.* that he be before our justices at *Westminster*, on *Thursday* next after the morrow of *All Souls*, to answer to *John Doe* of a plea of trespass on the case, *that it whereas (to the end of the bill)*, to the damage of the said *John* of 5*l.* as it is said; and have there this writ. Witness *at London* Lord *Loughborough*, &c.

The like against a Member.

George the Third, &c.
To the Sheriff of *Middlesex*, greeting: We command you, that you summon *Richard Fenn, Esq;* (*having privilege of parliament*), that he be before our justices at *Westminster*, on, &c. to answer to *John Denn* in a plea, that he render to the said *John* 8*ool.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; *For that whereas (to the end of the bill)*, to the damage of the said *John* of 100*l.* as it is said; and have you there this writ. Witness, &c.

N. B. Make a *procurator* for the filacer.

By writ.

R. Earl of V.
by all

George the Third, &c. To the Sheriff of *Middlesex*, greeting: We command you, that you distrain *Richard Fenn*, Esq; (*having privilege of parliament*),
by

by all his lands and chattels in your bailiwick, so that neither he, nor any one through him, put his hands thereon, until you shall have other command from us, and that of the issues thereof you answer to us, so that he be before our justices at *Windsor* on Thursday next after the morrow of All Souls, to answer to John Denn of a peer, that he render to him 80 l. which he owes to, and unjustly detain from him, for that whereas (to the end of the bill) to the damage of the said, of 2 l. as it is said, and to be judgment for his many defaults, and have you there this writ. Witnesses, &c.

Make a *præcipe* for the filicer in common form.

“ That the court may order the issues levied from time to time to be sold, and the money arising thereby to be applied to pay such costs to the plaintiff as the said court shall think just; and the surplus to be retained, until the defendant shall have appeared, or other purpose of the writ answered. Provided when the purpose of the writ is answered, that then the said issues shall be returned, or if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon. 10 Geo. 3. c. 50. s. 3, 4.”

Court may order the issues to be sold, &c.

If the defendant neglects to appear, for which you search at the filicer at the return of the *di ringas*, a return thereof must be got from the sheriff, who returns issues of court to 40s. pay 2s. upon which you sue out an *alias* in the same manner as the former, and a third, if necessary, when the plaintiff may move in the treasury upon the production of the return of the first, to increase the issues, which the court may order at discretion, the rules are drawn up at the second return, the same, and at the same time “*show the cause of the rule*.” If the defendant appears, you may, upon the following affidavit, move the court for a rule to shew cause “*why it should not be referred to one of the prothonotaries to tax the plaintiff's costs, if so ordered by the court of distresses and alias distresses issue in this cause to the sheriff of Middlesex, and also the costs of this application*.”

“ application to the court, and why the said sheriff
 “ should not be directed to sell so much of the issues le-
 “ vied by him, by virtue of the said writs, as will be
 “ sufficient to answer the said costs when taxed, and
 “ why the said sheriff should not, with the monies aris-
 “ ing from such sale, pay to the plaintiff or his attorney
 “ such costs, and return the residue of the said issues
 “ to the defendant, pursuant to the Act of Parliament,
 “ in that behalf lately made and provided.”

Give the affidavit to a serjeant, fee 10s. 6d. to move, draw up rule with the secondary, pay 9s. 6d.; serve copy on the defendant's attorney, make affidavit of the service, and of *shewing* the original; give brief to a serjeant, fee one guinea to make it absolute, then draw up rule absolute, and appoint with the prothonotary to tax, serve copy of rule and appointment, and when the costs are taxed, the sheriff, on producing the *abstract* and rule, will pay them, or you may move the court against him for an attachment.

Affidavit to
ground a rule
for the sale of
the issues.

A. B. of, &c. Gentleman, attorney for the plaintiff in the above cause, maketh oath and saith, That the plaintiff's cause of action is for work and labour done and performed by the plaintiff for the defendant, and for materials found and provided by the said plaintiff for the defendant, and that the said defendant was duly summoned by the sheriff of *Middlesex*, by virtue of a writ of summons issuing out of and under the seal of this honourable court, returnable on *Wednesday* next after fifteen days of *Easter* last past, to appear in this honourable court, at the suit of the said plaintiff, as appears to this deponent by the return on the back of the said writ of summons made by the said sheriff of *Middlesex*, and that the said defendant not appearing at the same within the time limited by the rules of this honourable court, a *default* against the defendant's goods issued, on which the said sheriff of *Middlesex*, &c. levied and returned 40s. issues; and that the said defendant not appearing to such *default*, an *alias default*, issued on the first day of *May* instant, returnable on *Wednesday* next after five weeks of *Easter*, on which the said sheriff, by vir-

In what cases it
formerly lay, and
in what now.

It formerly eny lay for *treason* and *felo*; but now by the statute 19 Hen 7 c 9. "Process of
"outlawry may be sue'd, as well in *actions upon the*
"case as in *actions of trespass or debt*" Vide
25 Ed 3 c 17. Put it lies in no case but where a
caption lies. 2 Roll 20 76

Outlawry
is a felony.

Outlawry, in civil actions, is considered as in the
nature of civil process, to compel an appearance to
the suit, or, if after judgment, to procure satisfaction.
The forfeiture, though nominally to the
King, is in truth given to the plaintiff towards
payment of his demand. If the outlaw appears, he
pays all the costs, puts in sufficient bail, and does
all he can to put the plaintiff in as good a condition
as he would have been in originally, or, if after
judgment, the outlaw pays the *debt and costs*, the
court reverses the outlawry upon motion, without
any writ of error.

This manner of proceeding is used as well where,
in an action against two or more, one is indicted, and the
other is not, but outlaid, as where one does not declare separately,
but relies on the other, and is outlawed, and
in order to take care that the bail of the one be not
annihilated at the trial, the second term of the re-
turn of the writ, the court declares against him,
serves on him a notice, and continues the action from
term to term till the other comes into court, or is
outlawed.

Two ways or
proceeding

There are two ways to proceed to outlawry in
this court, the one by original *quare sum sit*,
and the other by *scire facias* original. If you proceed
by the first, the defendant may, after he is returned
the writ, and the first *scire facias* the same with
out bail, pay the plaintiff's costs, on entering
of a return. *Prerogative 374*

Original writ
to be returned,

The writ is return'd if he *refuse to answer the cause of action*
and has eight days between the *refusal* and
return, and a return is made, and a *scire facias*

How to proceed
upon the original
quare sum sit
proceeding.

To proceed upon the *original quare sum sit*, &c.
make a *scire facias* for the same, take it to the sheriff,
who will bespeak the original, and make out a *ca-*
pias,

pias, *alias*, and *pluries* (provided your cause of action has accrued time enough to *test* your original back), and sign them, seal them, and leave them with the sheriff for a return of *non est inventus*, call on the filacer in the mean time for the original, who will procure it for you. get that also returned *nil* by the sheriff. When the *pluries* is returnable, call on sheriff for same, then file a warrant of attorney for the plaintiff, and take the *pluries* to the clerk of the warrants, who will mark it (pay the warrant *ad*). The return *ex parte* and *proclamation* is to be made out as aforesaid.

But if you mean to hold the defendant to bail, make an affidavit of the debt (*which must amount to 10 l or upwards, and be due before a return, or the first of the county where the venue is, and filed with the filacer*), prepare *praecipe* for a *judicial* or *final*, wherein you are to set forth the degree, proof, &c., or may set forth the defendant, together with the return or *habeas corpus*, and county in which he is, or was *con-*
ceptus, thus,

Middlesex, to wit, If Richard Tenn make you secure, &c. then partly surties and take pledge, John Denn, late of the county, in the said county, hofor, that he be before our justices at *Hilary*, on the next return of the *Hilary*, to show, For that where- as it is set forth that the whole debt is due. Wherefore the plaintiff says he is injured and hath sustained damage to the value of 10 l as it is said, &c.

Take this to the filacer of the county, who will receive the King's fine and curfitor's fee, and also make out the *certis*, *ad*, and *pluries* which he files (pay 4 d per writ, 1 l 7 s each), leave them with the sheriff for a return of *non est inventus*, also call on filacer for the original, and get that returned with the sheriff. When the *pluries* is returnable, call on sheriff for same, then make out and file a warrant of attorney on the *pluries*, pay *ad*, the clerk of the warrants will stamp the *pluries*.

Middlesex, (ss) Richard Tenn puts in his place
 S U his attorney, against John Denn, late of, &c.
 upon, in a plea of trespass on the case.

“ No

How to proceed,
 if you are to
 hold defendant
 to bail

Praecipe for spe-
 cial original.

Warrant of at-
 torney.

No pluries capias received, till stamped by the clerk of the warrants.

"No *ex'gent* shall receive any *pluries capias* in order to make an *exigent* or *proclamation* thereon, before the same be signed or stamped by the clerk of the warrants, or his deputy, to the end it may appear that the warrants of attorney therein are duly filed." *Rule Hil. 2 & 3 Jac. 2.*

Take the *pluries* to the *ex'gent*, Mr. *Midgencroft*, No 8, *Holborn Court*, *Gray's-Inn*, who will thereupon make out an *exigent* and *proclamation*, which get sealed, take the *exigent* to the sheriff's office, if in *Middlesex*, or to one of the compters, if in *London*, and leave it there to be perfected, and the *proclamation* you send down to the sheriff of that county, who in the defendant is named in the writ, for him to be proclaimed.

What the exigent and proclamation require.

The *exigent* requires the sheriff to cause the defendant to be demanded or exacted in five county courts successively, to render himself, and if he does, then to take him, as in a *capias*; the *proclamation* commands the sheriff of the county wherein the defendant dwells, or last dwelt, to make three *proclamations* thereof, in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. 6 H 8 c. 4. 31 *Edw. 3* if no sheriff writ is to bear title, and return the same at the writ of outlawry.

Three proclamations shall be made in every action personal, wherein any writ of exigent shall be awarded, &

When any writ shall be awarded, a writ of proclamation shall be made out of the *exigent* and return of the writ of exigent, directed to the sheriff of the county wherein the defendant at the time of the writ awarded shall be dwelling, which writ of outlawry shall concern the effect of the same action and shall be shown to the proclamation that he directed, shall make three proclamations, viz. one in the *county court*, at the *county court*, at the *general quarter sessions* for the term, in the *parish* where the defendant, at the time of the exigent awarded, shall be dwelling; and one other one month at least before the next *county court*, by virtue of the writ of exigent, at or near the most usual door of the church or chapel of that town or parish where

for the demand of the party must be at "five county courts, successively held one after another, without any court intervening" 2 H. P. C. c. 20. "And all the writs must follow one another, and no term to elapse between the *capias*, *pluries*, *exigent*, or *allotatur*

Capias ultimum is the next writ that issues after the return of the defendant outlawed on the exigent.

If the defendant does not put in and perfect special bail, at the return of the *exigent* or *allotatur* (or *five common appearances with the justice of the county, on the common originii*), the proclamation is to be filed with the *custos brevium*, then take the *exigent* and *allotatur* to the clerk of the outlawries, at the Attorney General's, who will make out a *special capias ultimum*, which is to extend the goods and chattels, lands and tenement, of the defendant, and to take his body also, if he be taken, he must put in and perfect bail before he can be released, if his goods, &c. be taken, get the sheriff to take an inquisition thereon, but a notice is required to be given to the defendant. Produce witnesses to the sheriff to prove deeds, or any other thing taken, that they are defendant's, and an appraiser who has made appraisement thereof to prove the value. As soon as the *capias ultimum* is returned, get it from the sheriff, take a copy for yourself, then take it to the clerk of the outlawries, who will transcribe and transmit it into the exchequer, speak to your clerk in court, and he will then issue out a *return expensis*, directed to the sheriff, to sell the goods and chattels appraised and found upon the inquisition.

How to proceed before the sheriff.

It is to plaintiff's advantage to take them at the appraised value, put the money to the sheriff, who will return a bill or sale of same, or if leases are taken in possession, he will assign the same, and return the *return expensis* which is filed with your clerk in court. Note. The sheriff in these cases exacts to be paid an extra fee.

If the debt does not exceed 50. the court of Exchequer, on motion, will order the money to be paid to the plaintiff (*providet his debt and ojis amount to that sum*), upon reading the return of the *venditioni expensis*.

If

until, according to the law and custom of our kingdom of *England*, he be outlawed, if he does not appear, and if he does appear, then take him and safely keep him, so that you may have his body before our justices at *Westminster*, in fifteen days of *Easter*, to answer to *John Denn* of *pl a*, for that whereas (here insert the whole process) to the said *John* his damage of *oc l* as it is said, and whereupon you did in *last p ft* (the return of the pluries), make return to our justices, that the said *Richard* was not found in your bailiwick, and have you there this writ. *Witness, &c.*

To be signed by the exigenter, pay him according to length, and seal 71

Proclamation

Gen, the Third, &c. To the Sheriff of *Middlesex*, greeting. Whereas by our writ, we lately commanded you, That you cause *Richard Fern*, late of *Westminster*, in your county, merchant, to be demanded from county court to county court (if in London "from hustling & listing"), until, according to the law and custom of our kingdom of *England*, he be outlawed, if he shall not appear, and if he should appear, then that you should take him and keep him safe, so that you might have him before our justices at *Westminster*, in fifteen days of *Easter*, to answer *John Den*, in a certain plea of trespass on the case, to the damage of the said *John*, of 600^l. as is said, We command you, that according to the statute made in the thirty first year of the reign of *Lizareth*, late queen of *England*, you cause the said *Richard* to be proclaimed three several days, according to the form of the said statute, one of which proclamations to be made at or near the most usual church door of the parish where the said *Richard* is an inhabitant, that he render himself to you, so that you may have his body before our justices at *Westminster*, at the afore said time, to answer the said *John* of the plea aforesaid, and have there this writ. *Witness, &c.*

To be signed by the exigenter, pay sealing 7d

Geo 28

for when the inquisition has returned the outlawed to be possessed of any goods or lands, the property of those goods belongs to the king, since the outlawed being out of the king's protection, cannot enjoy any thing; and the profits of the land are to be seized into the king's hands; but the lands themselves are not forfeited, unless it be in capital cases; but in other cases, the profits are seized whilst the party continues outlawed, and therefore the transcript of this record is sent into the Exchequer, that the court of ordinary revenue may have it in charge, but the court of Exchequer usually grant a *cu'ediam* to such person as sued out the outlawry. *Hard. 422. Carth. 441. 16 J. 19. 2 Barn. 314.*

*To the Right Honourable the Lords Commissioners of his Majesty's Treasury,
The humble petition of A. B.*

Sheweth,

Petition to the
Lords.

That *Ricard Fenn*, late of *Westminster*, merchant, being justly indebted unto your petitioner in the sum of 50*l* upon a promissory note of hand, bearing date the 22d day of *June* 1778, and also in 50*l* for goods sold and delivered to the said *R. F.* your petitioner was obliged to outlaw him for the recovery thereof.

That a writ of special *capias ut latatum* having issued against him, out of his majesty's court of Common Pleas at *Westminster*, at the suit of your petitioner, an inquisition was taken thereof, by the sheriff of *Middlesex*, whereby certain goods and chattels to the value of 150*l*. [*here set forth the substance of the inquisition*] were by the said sheriff seized and taken into his Majesty's hands, which said inquisition being returned into his Majesty's court of Exchequer, at *Westminster*, a writ of *execution ex-fors* duly issued out of the said court, whereon the said sheriff hath returned, that he has, by virtue thereof, sold the goods and chattels in the said writ mentioned, for the sum of 1*l*. being the dearest price he could get for the same; which monies he

had

had before the barons of the King's Exchequer, at the day in the said writ mentioned, ready to be paid to his Majesty's use.

That your petitioner has been at great expence in the said proceedings; and as his Majesty is not concerned in interest, but his name only made use of by your petitioner for the recovery of the said debt.

"Your petitioner therefore humbly prays your lordships, that his Majesty's attorney-general may be authorised to consent on behalf of his Majesty, that the sum of 125*l* may be paid to your petitioner towards satisfaction of the said debt and costs."

And your petitioner shall ever pray, &c.

These are to certify, That in term, in the Certificate of the clerk in court.
twenty-second year of the reign of his present Majesty King George the Third, a transcript of an outlawry was returned and filed in this court against *Richard Fenn*, late of *Wexminster*, in the county of *Middlesex*, merchant, outlawed in *Middlesex*, at the suit of *J. D.* in a plea of trespass on the case, by which transcript it does appear, that several goods and chattels of the said *Richard Fenn* were seized into his Majesty's hands by *William Gill*, Esq; and *William Nicholson*, Esq; then sheriff of the said county of *Middlesex*, by virtue of a *special capias utlagatum*, in the said transcript specified: *And I further certify, That a writ of venditioni exponas* has issued, for selling the said goods and chattels so seized, whereon the said sheriff hath returned, that he hath sold the same for the sum of

In the Common Pleas,

John Denn, plaintiff,
and

Richard Fenn, Defendant.

John Denn, of, &c. maketh oath and saith, That Affidavit.
the above named *R. F.* is justly and truly indebted unto this deponent in the sum of 125*l*. according to the annexed account, and for costs paid to Mr.

N n

G. C.

G. C. this deponent's sole duty in prosecuting the outlawry in this cause is to the said R. P.

If goods be taken
after outlawry
reversed, defend-
ant shall be re-
stored to them.

If the goods of the person outlawed be taken by the sheriff, and after the outlawry is reversed by writ of error, the defendant shall be restored to the goods again, because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king. 5 Co. 90. 1 Roll. Abr. 778. Cro. Eliz. 278 2 Inst. 101.

If sale is made,
though he shall
have the pro-
ceeds.

If a sale be made of the goods under the *capias utlagatum*, the defendant will be entitled to the monies arising by such sale, after deducting the expences and fees, if a term is sold, he shall only be entitled to the money arising by the sale. Cro. Eliz. 278 Lyre v. Hoo 131.

Defendant cannot
be taken on a
writ of outlawry.

The defendant cannot be taken on a *subpoena* upon a *capias utlagatum*, Stat. 29 Car. 2. c. 7. though the court will not attach the sheriff, but leave the defendant to his remedy given by the statute.

Of appearing to supersede the Exigent, and reverse the Outlawry upon the Common Original, or when no Bail is required.

On appearing
and

If the defendant has notice of the exigent, he may apply to Mr. Meddewcroft, No. 8. Holborn Court, Grays Inn, the exigenter, who will make out a *superjeccas* thereon, pay 9s 4d. signing, seal 7d. leave the same at the sheriff's office, pay following 2s 4d and there is appearance entered with the exigenter, the *superjeccas* being made out by him, is held till the next appearance. Barris 319.

N.B. By the practice of this court, the defendant has always had till the *quarto die post* to appear to the exigent, R. P. C. of Pract. C. 1. 28. 1. that a *superjeccas* cannot be made out till the day after the *quarto die post* for the exigent.

If a *superjeccas* is
reversed at
his own expence
on confession ap-
pearance.

If the defendant be returned outlawed, and the exigent held, he has a right to reverse same at his own expence, on entering a common appearance and payment of costs, Barris 323. which I think should

be done on application to a judge for a summons for that purpose, and on delivering the order and receipt for the costs taxed, Mr. Lickbarrow enters the reversal.

Of appearing to supersede the Exigent, and reversing the Outlawry on a Special Original, where an Affidavit has been made of the Debt.

IF the defendant has not been outlawed by the sheriff, "or the exigent has not been signed," he may, Bail to the exigent. by applying to the exigenter, put in special bail, who fills up the bail-piece, and takes the bail to a judge, and notice must be given of same, and they must justify, and a superedeas sued out, or the sheriff may go on. *N. B.* The notices are the same as in other cases, and on receipt of the rule that bail are perfected, the exigenter makes out a superedeas to stay the sheriff from further proceeding.

But if it be bail on the *capias utlagatum*, The like to the cap. utlagat. the defendant's attorney must apply to the clerk of the outlawries to bail same, who will fill up a bail-piece for that purpose; take the bail to a judge, and afterwards perfect same; then apply for a summons, to shew cause why, upon payment of the costs, the outlawry should not be reversed; and upon producing the rule to a judge, that the bail are perfected, he will grant an order. *N. B.* The costs must be forthwith paid, and receipt produced to Mr. Lickbarrow, so as to entitle him to make out a superedeas, and the entry of the reversal; pay him about 2*l.* 4*s.* 10*d.*

The bail upon a *capias utlagatum* in this court are for the debt, and not to render. *Barnes* 326.

The ancient mode of practice in this court was, that the defendant might appear before he was outlawed, be the debt never so great, by superseding the exigent, and paying the plaintiff's costs; but the following rule has now provided, "*That where affidavit is made of the debt, the defendant shall not be*

“ entitled to a supersedeas, unless he puts in and perfects his bail.”

Easter Term, in the 21st Year of the Reign of King George the Third.

*Whereas, as the law now stands, a suitor, in case his cause of action shall amount to the sum of 10*l*. and he doth proceed to arrest the person pursuant to the statute, and the course of the court, and the defendant is thereupon arrested, there can be no appearance but by putting in special bail. And whereas a practice hath prevailed in this court, where the defendant absconds, to avoid being arrested, and cannot be arrested, although all possible endeavours have been used for that purpose; that nevertheless, before he is actually outlawed, he may obtain a supersedeas on a common appearance: which practice originally obtained when the defendant was liable to be arrested, without a previous affidavit of the cause of action; but that being now necessary by law, it is unreasonable that the defendant should desire such advantage from his own fraudulent conduct. This court doth therefore order, That from the first day of Trinity term next, where the defendant shall abscond to avoid being arrested, and cannot be arrested (although the plaintiff shall, bona fide, have used his best endeavours for that purpose), a supersedeas shall not be issued to “ stay the proceedings to an outlawry, unless the defendant shall first put in special bail:” And that the writ of supersedeas thereupon issued, in case special bail shall not afterwards be perfected according to the course of the court, where special bail is required upon arrests, shall be void, and of no effect to stay the plaintiff’s proceeding to outlawry, but the same may be gone on with, from the time of such default, as if no appearance had been entered, or special bail filed, and shall not be deemed irregular or erroneous, by means of such interruption of the proceedings, by putting in special bail, and not afterwards perfecting special bail as aforesaid.*

Rules

Rules of Court respecting Outlawries.

NO outlawry, after the death of the plaintiff, shall be reversed, without the defendant's appearing and putting in special bail (if the action so requires) to the executor or administrator of the plaintiff, to the husband and wife, in case where the wife, whilst a *feme sole* sued the defendant to an outlawry before marriage. Provided that the plaintiff's attorney to the writ of *exigent* or *capias utlagatum*, do within fourteen days after notice to him given, of the defendant's intention to reverse the outlawry (deliver *) the name or names of the executor or administrator of such plaintiff or plaintiffs deceased to the proper prothonotary. *Rule T. 2 fac. 2.*

By rule T. 33 *Car. 2.* No defendant who, or after the month of *St. Michael* next coming, shall be outlawed, and who shall appear and reverse the outlawry, shall, upon such refusal, pay for costs to the plaintiff any sum of money exceeding the usual costs of the *exigent* in this court, together with the fine to our Lord the King, upon the *original writ*, if any was paid; and that all further costs shall be respited until the time of signing judgment for the plaintiff. And that every defendant so outlawed and reversing such outlawry, if the plaintiff shall not proceed thereupon within two terms next after notice of the reversal thereof, shall have costs to be taxed by the prothonotary. *Ibid.*

And for the better execution of the process of outlawry, to be made and issued by and out of this court, and the prevention of divers abuses by neglect of the same, and for the better regulating of the reversal of outlawries, *It is ordered*, That upon every writ of *exigent*, which shall be sued forth of this court, from and after this term, if a *superjudeas* be not put in thereunto at or before the day of appearance thereof, that no *superjudeas* shall by any sheriff be allowed to any such writ, until the defendant shall have paid unto the plaintiff, or his attorney,

No outlawry after the plaintiff's death to be reversed, till appearance on bail.

* *delivered*, is not in the rule.

Upon reversing cut *viv*, defendant shall pay nothing exceeding the usual fees, &c.

If plaintiff proceeds in two terms, defendant to have costs.

No *superjudeas* after the return of the writ till costs are paid.

torney, or left in the court, with one of the prothonotaries thereof, the full and just costs of suit therein, *R. T. 2 Jac. 2.*

Special bail
where the sum
or damages
amount to 10l.

And that upon reversing all and every outlawry, the party defendant which reverseth the same, shall, before the reversal thereof, or any *super'ideas* made thereunto, give special bail, if the sum of money, or damages expressed in the original whereupon the *exigent* is awarded, shall amount to the sum of 10l. or upward, and pay to the plaintiff or his attorney, or leave in the court for him or them, the full and just costs of suit to the *exigent* as aforesaid *Ibid.*

Where further
cost shall be
taxed and paid
before certificate.

And where the plaintiff, by virtue of such outlawry, hath taken an inquisition, and extended into the king's hands the goods, chattels, lands or tenements of the outlawed person, and returned the same into the *exchequer*, such further just and reasonable costs shall then be taxed by the prothonotary, and likewise paid to the plaintiff or his attorney, or left in court for him or them, as the plaintiff hath been at in taking and prosecuting the said inquisition, before any certificate of such reversal shall be made by the clerk of the outlawries in that behalf. *Ibid.*

Sheriffs not to
enlarge outlawed
persons without
superfideas.

And for the prevention of the great and common abuse by sheriffs officers and bailiffs, for enlarging persons arrested upon *capias utlagatum*, before judgment, without a lawful *superfideas* in that behalf first delivered unto him or them, that upon affidavit thereof, every person offending therein shall pay the sum of 40s. to the party grieved, who shall have an attachment of course against such sheriff's officer, bailiff, or party offending, for payment of the same; and the party or parties so offending shall likewise undergo such other punishment as by the court shall be thought fit. *Ibid.* Vide *R. M.* 165.

Sheriffs not to
discharge any
person taken up
on outlawry
without superfideas.

No sheriff, under sheriff, &c. shall set at liberty any person taken upon any writ of *capias utlagatum*, nor discharge the lands or goods of any person outlawed, by them seized upon any writs of *capias utlagatum*,

legatum, without a lawful *superedeas* under the seal of the court, to them delivered, for such discharge. *Rule H. 15 & 16 Car. 2.* That no such *superedeas* be made or issued out of this court, by any officer, clerk, attorney, or minister of the same, without sufficient bail being first taken according to law, and former orders and usages of this court. *Ibid.*

Before any allowance of any writ writ of error, or reversing of any outlawry, be had, by plea or otherwise, through or by want of any *proclamation* to be had or made, according to the statute, the defendant in the original action shall put in bail, "not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the said plaintiff, for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry." *Rule M. 12 G. 1. Vide stat. 31 Eliz. c. 3. f. 3.* On allowing any writ of error to reverse any outlawry, the defendant must enter into a recognizance, to "satisfy the condemnation money," according to *Stat. 13 Eliz. c. 3. f. 3. R. M. 12 G. 1. Rep. & Cas. of Pract. 11 G. P. 29.*

Order upon Outlawries transcribed into the Court of Exchequer.

WHERE any outlawry shall be transcribed into this court, and process made out thereupon, and afterwards such outlawry shall be reversed, before any judgment shall be entered for removing the king's hands, and the party outlawed restored to his possession, the prosecutor of such outlawry shall be paid such costs as shall be taxed by their Majesties remembrancer, or his deputy for the proceedings in this court. Made a rule of this court. *T. 1 H. & M.*

By *Stat. 13 H. 3. Stat. 2. c. 2. f. 4.* "No sheriff or under-sheriff, nor any officer or minister, shall take any costs or charges, or any other thing, for the reversal of any outlawry, or for the restoration of any person to his possession, or for any other thing, but only such costs and charges as shall be taxed by the remembrancer, or his deputy, for the proceedings in this court." *N n*

Outlawries transcribed into the Court of Exchequer shall be reversed, costs to be paid

No sheriff or under-sheriff, nor any officer or minister, shall take any costs or charges, or any other thing, for the reversal of any outlawry, or for the restoration of any person to his possession, or for any other thing, but only such costs and charges as shall be taxed by the remembrancer, or his deputy, for the proceedings in this court.

ca. utlagat, until he receives a superſedeas,

“ ſter, ſhall diſcharge any perſon or perſons taken
“ upon any writ of *capias utlagatum*, out of cuſto-
“ dy, without a lawful *ſuperſedeas* firſt had and re-
“ ceived for the ſame.” *Vide R. Hil. 15 & 16 Car. 2.*
Vide 4 & 5 W. & M. c. 18. ſ. 4. It is thought
the ſheriff, altho’ this ſtatute relates to the King’s
Bench, may take bail upon the *capias utlagatum* in
this court (*vide 2 Cromp. 62*), without a *ſuperſedeas*,
to appear, and as the ſtatute directs.

*It is determined in this Court reſpecting the ap-
pearance to the Exigent, and of reverſing the
Outlawry about Error.*

Proceedings
ſtaid on the out-
lawry on pay-
ment of the
debt and coſts.

A writ of *ſuperſedeas* to an *allegatum* to the *exigent*,
could not be granted in the morning of the day
when the *allegatum* was received, it being an
holy day, but was ſealed and brought to the ſher-
iff’s office in *London*, about an hour after the de-
fendant was returned outlawed — The proceeding
was by *local* exigent, which required bail. Mo-
tion and rule was to ſhew cauſe why the defendant
ſhould not have leave to ſuperſede the *exigent*, on
payment of coſts. Ordered, That proceedings on
the outlawry be ſtayed, on payment of debt and
coſts within a month, but in default, the rule to
be diſcharged, and plaintiff at liberty to proceed on
the outlawry. *Parnes 370. Chalmers v. Fox.*

Proceedings
ſtaid on the exi-
gent, defendant
becoming a pri-
ſoner in the Fleet

It appeared, that pending the *exigent*, defendant
was a priſoner in the gaol for the city of *York*; for
which reaſon, court ordered the outlawry to be re-
verſed without coſts, upon defendant entering a
common appearance. *Burnes 221. Hucky v. Hew-
ſom.*

Outlawry com-
menced during
defendant’s reſe-
nce in *Ireland*
reverted

Outlawry commenced and proſecuted during de-
fendant’s reſequence in *Ireland*, ſhall be reverted with-
out bail or appearance. *Burnes 325.*

The defendant
appears publicly,
yet keeping out
of the way of ar-
reſt may be out-
lawed.

Motion to reverſe outlawries on *common claſum
fregit*, at the plaintiff’s expence, on affidavits of
defendant’s public appearance and dealings, ſworn
by themſelves only, *per cur.* Let the rule be en-
larged till next term, that the plaintiff’s attorney

may, in the mean time, make satisfaction to the parties. *Barnes* 320.

If defendant goes beyond sea after the *teste* of an exigent, he may be regularly outlawed. *Barnes* 321. If defendant goes beyond sea, after teste of exigent, may be outlawed.

Where the outlawry is not special, defendants may reverse at their own expence, and payment of costs at common appearance, if before transference into the Exchequer, common costs to the plaintiff, if after, costs to the time of reversal.

Barnes 324.

Before defendant is returned outlawed, he may put in the *exigent* on appearance and costs, but after, there must be bail, who are bound to pay the costs, without option to render the principal. *Barnes* 326. Before defendant is returned outlawed, may put in the exigent on appearance and costs, but after, there must be bail, who are bound to pay the costs, without option to render the principal.

The court will not interfere in a summary way to set aside the outlawry for want of *proclamation*, but will put the defendant to his writ of error. *Lane* 323. The court will not interfere in a summary way to set aside the outlawry for want of proclamation, but will put the defendant to his writ of error.

Proceedings are not to be stayed, because the plaintiff died after the day of outlawry, but before the return, *per curiam* the representative may proceed, if so advised. *Barnes* 323. Proceedings are not to be stayed, because the plaintiff died after the day of outlawry, but before the return, per curiam the representative may proceed, if so advised.

In debt on bond, by *de dum flia*, the husband is gone abroad and outlawed, and the wife, though she appears publicly, is waived, the outlawry against her shall be void on motion, but good taken on a *cap. ult.* it must be decided the husband's, though sworn to the contrary. And if she has an equitable right, she must only in equity. *2 Mills* 127. *Hjor v. A. and others*. In debt on bond, by de dum flia, the husband is gone abroad and outlawed, and the wife, though she appears publicly, is waived, the outlawry against her shall be void on motion, but good taken on a cap. ult. it must be decided the husband's, though sworn to the contrary. And if she has an equitable right, she must only in equity.

If *de dum flia* is void in the process, and after *exigent*, and *de dum flia* marries, the court will not interfere in a summary way, as the marriage was after the *exigent*. *Barnes* 321. *De Dunster*. If de dum flia is void in the process, and after exigent, and de dum flia marries, the court will not interfere in a summary way, as the marriage was after the exigent.

Lane 324. De Dunster.

If a person procures another to be outlawed clandestinely, who appears openly and in public, the court

court

court will, on motion, oblige such person who procures the outlawry, to reverse the same at his own costs; but if it appears that the party outlawed had lurked backward and forward between two counties, and that the person procuring the outlawry had dealt openly, and had been regular in sending down the proclamations to the sheriff of the county where he sometimes resided, the court will not interpose in this summary manner, but leave the party to his ordinary remedy by plea or writ of error. 2 Vent. 46. 2 Jon. 211. Comb. 19. 2 Salk, 499.

Of reversing the Outlawry by Writ of Error.

A WRIT of error to reverse an outlawry in any civil case, is not often heard of now, as the party generally comes in and reverses it by motion, and satisfies the debt and costs, or justifies bail to appear to a new original; or if special bail is not required, enters a common appearance; in which case the outlawry is reversed of course before a judge, or in court, by confession of some trifling error in the proceedings, as the omission of any letter, irregularity in any of the process, want of proper addition, want of proclamation, want of filing the writ of proclamation, or, in short, any trifling matter whatever, which in such cases is usually confessed by the plaintiff. For as the intent of proceeding to outlawry is answered, either by the payment of the debt and costs, or by having good bail to stand the event of the action, any objection to the reversal of the outlawry would be idle and nugatory.

How to apply
for a writ of
error.

When a defendant, to reverse an outlawry, is obliged to sue out an actual writ of error, he must apply to the proper curitor for the writ, who, on a *præcipe* being given him, will make out same.

When

When the writ of error is duly made out and sealed, the defendant must get it allowed by the court, on which allowance the *allocatur* is subscribed.

If the error is in the *exigent* or *return*, or *allocatur*, or in the writ of *proclamation* or return thereto (having first put in bail according to the statute), or in any of the proceedings, he gets a copy thereof, and spreads the whole record, and assigns the errors in this manner:

Afterwards, to wit, on next after Assignment of errors.
in this same term, comes here the said *C. D.* by

his attorney, and immediately says, That in the pronouncing of the outlawry aforesaid there is manifest error in this, to wit, that the return of the said writ of *exigi facias*, and also the said writ of *allocatur*, are insufficient, invalid, and void in law, therefore in that there is manifest error. There is error also in this, that no judgment of outlawry, upon the writ of *allocatur* aforesaid, is returned; therefore in this there is manifest error (and so on assigning the error or errors, as they happen to be). And the said *C. D.* prays the writ of our Lord the King, to warn the said *A. R.* to be before our said justices, to hear the record and proceedings aforesaid, And it is granted to him, &c.

If the plaintiff does not appear and confess the errors, the defendant must sue out a *scire facias ad audiendum errores*, &c.; and upon two *nihil*s returned, the court will reverse the outlawry of course: but if the plaintiff comes in voluntarily, or upon a *scire feci*, and does not confess the errors assigned, but joins in error, the defendant must make up error-books, and proceed to argument and judgment, as in other cases of error.

Of declaring the Outlawry reversed or superseded.

UPON the reversal or superseding of the outlawry, and the defendant does not pay the plaintiff his

his debt and costs, he must proceed to declare, the defendant having upon reversing or superseding the outlawry, put in special or common bail, as the case required, to appear to a new original.

Upon appearing and superseding the exigent, the plaintiff must declare within six or eight days after, otherwise the defendant may give him a rule to declare; and if no declaration comes in within the limited time, the defendant may nonsuit the plaintiff, and have his costs taxed. *Comp. Sell. C. B.* 84.

So if the defendant appear by *superjudeas*, and will not take a declaration, the plaintiff may have judgment against him by *nil dicit*. *Ibid.*

But where a defendant outlawed causes the same outlawry to be reversed, the plaintiff has till the end of the *second term*, after reversing the same, and notice thereof given, to declare in; but if he does not proceed within two terms next after notice of reversing the outlawry, the defendant shall have his costs to be taxed. *R. Tr.* 33 *Car.* 2. *C. B.*

Where the plaintiff does not declare within two terms after outlawry reversed, the defendant may give a rule to this effect, *viz.* That unless the plaintiff declares within four days after notice of this rule to him or his attorney given, he shall pay to the defendant or his attorney costs to be taxed. *Pract. Reg.* 271.

Nonpros.

The plaintiff cannot be nonprossed after the outlawry reversed, for he cannot lose that writ which, by reversal, is become void. *Pract. Reg.* 271.

Of declaring after Outlawry.

THE declaration, after reversal or superseding of the outlawry, has no need to be laid in the same county in which the former original was made. So held on demurrer. 3 *Lew.* 245.

Where the original and outlawry were in *London*, and on the reversal of the outlawry, the plaintiff declared

clared in *Suffex*, on which it was insisted, that the original being laid in *London*, the plaintiff could not declare in the action in another county, though the cause of action was transitory; but the prothonotaries certifying, that the course of the court was, that altho' the original be laid in *London* for the expunging the outlawry, yet when the defendant comes, the plaintiff may declare against him in any other county, be the action local or transitory. And the *Stat. 21 Jac. 1 c. 16 s. 4* giving the plaintiff generally a power to commence a new action or suit, within a year after the outlawry reversed, the plaintiff may do it in this case, to warrant his declaration delivered within the course of the court. And the plaintiff had judgment. 2 *Crompton* 70.

By the 21 *Jac. 2. c. 16 s. 4* it is enacted, "That if in any action brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that then the plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment of outlawry reversed, and not after."

And by the 31 *Eliz. c. 3. s. 3.* it is enacted, "That before the allowance of any writ of error, or reversing of any outlawry be had by plea or otherwise, through or by want of any proclamation to be had or made, according to the form of the said statute, the defendant in the original shall be put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to justify the continuation, if the plaintiff shall be in his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the judgment."

Upon superceding the extent, if plaintiff deliver a declaration, there should be a notice to plead, and a rule given to plead before judgment, for want of a plea can be signed, and defendant has in such

case the same time to plead as in other cases. *Barnes* 271, 272.

Outlawry after Judgment.

N. B. This means where the action is brought by original.

IF you have judgment against a man that lurks in several counties, in regard you cannot regularly have execution against him in more counties than one at one time, the best way is to sue him to outlawry after judgment, for then you may take out as many writs of *capias utlagatum* against him as you please, and this for a small charge; besides, it saves you the charge of reviving the judgment by *scire facias* after the year, and you have an *exigent* immediately after the return of the *ca. fa.* without *av. alius* and *pluries*, and it is said, without a writ of proclamation; but I think otherwise.

The Method of suing Defendant to Outlawry after Judgment.

Proclamation also qu.

FIRST, sue out a *ca. fa.* for the debt and costs, as the case is, into the same county where the action was laid, and get *non est inventus* returned by the sheriff; then carry same to the *exigenter* of the same county, who will make out an *exigent* thereupon, which must be delivered to the undersheriff, to be returned as other *exigents* are.

The *exigent* being returned, the clerk of the outlawries will make out a *capias utlagatum* into as many several counties as you will, either in *England* or *Wales*, *general* or *special*; and if the defendant be taken, he cannot be discharged without satisfaction to the plaintiff, or pardon of the outlawry, or reversing the same for sufficient error.

Superseas upon reversal of outlawry.

George the Third, &c. To the warden of our prison of the Fleet, greeting: *Ubi* hereas *H. W.* late of the parish of St. George the Martyr, in the county of

of *Middlesex*, Gentleman, otherwise called *F. W.* of the parish of *St. George the Martyr*, in the county of *Middlesex*, Gentleman, was lately, by virtue of our writ of *exigent*, to our sheriffs of *London* directed, outlawed in *London*, on *Monday* next, before the feast of *St. Mark the Evangelist*, in the twenty-fourth year of our reign, at the suit of *H. W.* in a plea of debt for 90*l.*; which said outlawry, for certain reasons, our justices at *Westminster* especially moving, is reversed and annulled; therefore we command you, That you wholly forbear to seize into our hands any of the goods or chattels, lands or tenements, of the said *F. W.* or in any wise to molest him, by reason of the outlawry aforesaid; and if you have seized into our hands any of the goods or chattel, lands or tenements, of the said *F. W.* by reason of the outlawry aforesaid, and not otherwise; that then you deliver unto the said *F. W.* without delay, the said goods and chattels, lands and tenements, and permit him the said *F. W.* without delay, to go at large, as you will answer the contrary at your peril. Witness *Alexander* Lord *Loughborough*, at *Westminster*, the 28th day of *November*, in the twenty-fourth year of our reign.

George the Third, &c. To the warden of our ^{Superfedeas on} prison of the *Fleet*, greeting: *Whereas*, we lately ^{reversal of out-} commanded you, That you should cause to be de- ^{lawry, where} manded *H. N.* late of *London*, Esq. from husting to ^{bail is put in,} husting, until according to the law and custom of our kingdom of *England*, he should be outlawed, if he did not appear; and if he did appear, then to take him, and keep him in safe custody, so that you might have his body before our justices at *Westminster*, from the day of *Easter* last past, to answer to *H. P.* in a plea of trespass on the case, to the damage of the said *H.* of 130*l.* By virtue of which said writ, the said *H. N.* was afterwards outlawed, which said outlawry, for want of the return and filing of our writ of proclamation, is altogether void, and of no force nor effect in law; And *whereas* the said

said *H. N.* hath put in and perfected bail, to answer the said *H. P.* in the plea aforesaid; Therefore we command you, That if the said *H. N.* be detained in our said prison, under your custody, upon that, and no other occasion, then permit him to go at large, at the peril attending the neglect thereof. Witnesses, &c.

Infants.

BY the common law, a *male* or *female* is called an infant till the age of twenty-one years. *Co. Litt.* 171. *b.*; but by the civil law the age of seventeen years. *Ibid.*

In what cases
he is liable, and
what not.

An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physick, and such other necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation, or other writing, with a penalty for the payment of any of these, that obligation shall not bind him. *Co. Litt.* 172. *a.* And if he brings the materials to the Taylor, there is no need to aver that they were suitable to his quality. *Lat.* 157. Necessaries for an infant's wife, are necessities for him, but not if provided in order for the marriage, *Str.* 168.; and upon such contract by an infant, an *assumpsit* lies. *Lat.* 167. *Jon.* 146. *Pal.* 528. Or, if he gives a single bill for money upon such contract, it binds him. 1 *Roll.* 729. *l.* 20. *Cro. Eliz.* 120. 1 *Lev.* 86. The court shall judge what things are necessary. *Cro. L'iz.* 583. If goods not necessary are delivered to an infant, who after full age promises to pay, he is bound. *Str.* 69c. An infant shall be charged for a trespass done by him. *Com. Dig.* 3. *v.* 170. So an infant of seventeen years of age shall be charged for malicious words. *Noy* 129.

If warrant or at-
torney be given

If a warrant of attorney be given by an infant and another, and judgment is entred up thereon,
the

The court, on motion, will order the name of the infant to be struck out of the warrant of attorney, and set aside the judgment as against him. 2 Black. Rep. 1133. *100 Str.* 1045.

An infant is to prosecute a suit by his guardian or best friend, though the term used is *prochein amy*, which is next friend; but he cannot defend by such next friend, but must defend only by guardian, because the law suppose, that where he demands or sues for any thing, it is for his benefit. And therefore the law is not so watchful in that case of the person who takes care of his suit, as where he is to be defended, where he may sustain a loss, for the law is so careful, lest there should be prejudice done to the infant, that it will not suffer any person but a guardian to defend for him, who may be called to account by the infant, for his management and behaviour therein.

And therein there is difference, when an infant brings an action in his own right, and when in the trust, and for the benefit of another. for if he sues in the latter case, as executor or administrator, it shall never be allowed for error, because it is supposed for his benefit, however, that he can have no redress thereby, but for that case, judgment is given against himself, he cannot say it is in his name by attorney for error, because of the personal prejudice that may be there.

Yet if an infant be joined with others, in suing in his own right, or in the trust, though brought by one, or by all make out one person in law, yet it may be set aside for error. *Cre. 277*

But in all cases where an infant is defendant, though it be in another's right, and though joined with others, he must sue by guardian.

In all actions civil, personal, or mixed, against an infant, if an appeal by attorney, it is error. 8 Co. 59. *19 Co.* 51.

If an attorney undertakes to plead for an infant, and enters a plea, it shall be deemed as if made by the guardian.

Plaintiff may name one, if infant does not appear by guardian.

If he is served with process, court will make him appear by guardian.

How plaintiff is to apply.

Cannot, if he lives with his parent, bind himself to be a stranger for necessities.

Before declaration a guardian must be appointed.

If an infant does not name a guardian to appear by, the court will give leave to plaintiff to do it for him.

If an infant be served with process to appear by attorney, the court will make a rule for him to appear by guardian, or plaintiff to be at liberty to name one, to appear and defend for him. *Barnes* 418.

Plaintiff's attorney should apply to defendant to name a guardian; and if he does not in six days, you may apply to the court to oblige him to do it. *2 Wils.* 50.

An infant who lives with, and is properly maintained by her parent, cannot bind herself to a stranger for necessities. Common appearance ordered. *2 Black. Rep.* 1326.

The writ may be served at the suit of the infant, but before declaration, a guardian must be appointed by the court, which is done either by taking the guardian and infant before a judge at his chambers, or by petition; if by petition it is thus:

In the Common Pleas.

A. B. the younger, plaintiff,
and
C. D. defendant.

To the Right Honourable Alexander Lord Loughborough, L. J. Chief Justice of His Majesty's Court of Common Pleas,

The humble petition of *A. B.* the younger, an infant under the age of twenty-one years, the plaintiff in this cause,

Sheweth,

Petition to assign a guardian to prosecute.

To the petitioners on the 10th day of the month of June, 1864.

That your petitioner has, as he is advised, good cause of action against the abovenamed *C. D.* for assault, battery, wounding, and ill-treating your petitioner; and that your petitioner has sometime since commenced an action against the said *C. D.* for

for the same, but in regard that your petitioner is an infant under the age of twenty-one years.

“ Your Petitioner therefore most humbly

“ prays your Lordship, to assign unto

“ him, *G. F.* of, *Etc.* merchant, your

“ petitioner’s father, as and for your pe-

“ titioner’s guardian, to prosecute the said

“ action against the said *C. D.*

“ And your Petitioner shall ever

“ pray, *Etc.* *A. B.*”

Underneath which petition write the following
acceptance.

“ I do hereby agree to accept to be the guardian

“ to the above-named *A. B.* an infant, according

“ to the prayer of the above petition, *Etc.*

Witness *J. G.* attorney for *A. B.*

A. B. The infant must sign the petition.

J. G. of, *Etc.* gentleman, attorney for the plaintiff, *A. B.*,
in this case, maketh oath and saith, that
A. B. the above-named plaintiff, did on the day of
of the month of *July* last, duly sign the petition hereunto annexed,
in the presence of this deponent. And this deponent

sweareth, That he was also present, and did see
C. D. the person mentioned in the said petition,
duly sign the acceptance or agreement thereto
written, in order to his being a guardian to the said
A. B. the younger.

Take the petition and affidavit to the judge’s
chambers, who will thereupon make his authority
for plaintiff to prosecute by his guardian, &c. &c.;
take same to the prothonotary office, and enter it on
their remembrance roll, pay 2s.; leave admission
there, and when you declare, annex a copy of the
admission to the declaration.

Lemma, (fl.) *C. D.* late of *London*, yeoman, was the form of the
attached to answer *A. B.* in a plea of trespass on the case, &c.
case, and whereupon the said *A. B.* by *G. B.* who
admitted by the court of our Lord the King here,

to prosecute for the said *A. B.* the age of twenty-one years, as the said *A. B.* complains, *For that while* (in other case), when the said *A. B.* was injured, and hath sustained damage to the sum of 100*l* and therefore he is in this suit,

Ven. & h. corp. In the *vine and leaf as corporate* *u. a. m.*, say *A. B.* by his next friend plaintiff, or the *D.* by his next friend defendant.

This is the only difference in the form (except in the *form*), there you make the plaintiff appear by his next friend, or the defendant, if it so happen.

It has been said, that an infant cannot defend without a guardian, therefore you must either take him and his guardian before a judge to be admitted, or it may be done by petition, as follows, naming the cause.

In the Right Honourable Lord Chancellor's Court of Chancery,

The humble Petition of *C. D.* an infant, under the Age of twenty-one years,

Sheweth,
That the plaintiff hath lately commenced an action at law against your petitioner, for [here set out the cause of action], and your petitioner is advised and believes, that he has a good defence to the same, but in regard your petitioner is an infant,

“ Your petitioner humbly prays your lordship in power do please to assign *G. H.* the said his guardian to defend his suit.

“ And your petitioner shall ever pray.
“ *G. H.*”

Advocate's
equity, and
he former one
to prosecute.

“ I do not at all intend to be the guardian of the said *D.* an infant, according to the prayer of the above petition.
With respect, f. C.
G. H.”

Take

Take the petition and affidavit to the judge's chambers, leave it there for his admission, pay 12s., then take the admission to the prothonotaries office, and enter it on their remaining record, pay 2s., annex a copy of the admission to the plaintiff's next appearance with the filacer (*certificat de port*), then with the prothonotaries.

And the said C. D. by C. H. who is admitted by Plea of infancy
the court of our Lord the King here, to defend for the said C. D. who is under the age of twenty one
years, comes and defends the views of the court,
witness, &c. and says, That he the said C. D. is the
of the making the said several promises and under-
takings in the said declaration made by and under
the age of twenty one years, to wit, at the age of
seventeen years, and no more to wit, at the age
fore said, &c. and thus he is ready to verify where-
to, &c. if, &c.

If an infant appear and plead by attorney, and if infant appears
plaintiff find it out, he may in vacation time apply and plead by
to a judge for a summons (or return for a rule), to attorney and
show cause why the appearance should not be struck a plaintiff finds it
out and the plea set aside, and then defend himself may proceed.

They say have a warrant granted him to demand, or that plaintiff ought to be at liberty to name one for him, but this was refused to after trial *Barn*, 412.

[illegible]

Infant plaintiff
not liable to
costs, but *pro-*
chein amy, &c.

It is clear that the infant plaintiff, who sues by *prochein amy*, is not liable to costs, because he cannot, while under age, disavow the suit; but the *prochein amy* is liable, *Str.* 548. *Barnes* 128. and if it appears to the court that he is not of sufficient ability to pay the costs, the court will order another, who is. *Str.* 708. But an infant defendant (although he names a guardian) is liable to costs, if the verdict be against him. *Dy.* 104. 1 *Bullstr.* 189. *Str.* 1217.

Infant defendant
is liable, altho'
he names a guar-
dian.

Statute of Limitations.

The statute ne-
ver begins to run
against a plain-
tiff who is a fo-
reigner, until he
comes into this
realm.

IF the plaintiff is a foreigner, and doth not come to *England* in fifty years, he has still, six years after his coming into *England*, to bring his action; and if he never comes to *England* himself, he has always a right of action while he lives abroad, and to have his executors or administrators after his death. *Strickland v. Grame.* 3 *Wils.* 145.

It was held, that a *capias ad respondendum*, which was given in evidence to save the statute, without an original, was the true commencement of a suit in this court *per Gould*, *J.* the original must be produced, for it immediately precedes the *capias*. 3 *Wils.* 46. *Lead v. Mason*, and *per Blackstone*, *J.* every body now understands that a *capias* is the commencement of a suit in this court; and that there is no necessity to file an original, but in case of outlawry; and that the court always intends that an original be regularly issued, whereupon the *capias* is grounded, so that a *capias* on this, and all other statutes of limitations, is sufficient evidence of an original. 2 *Black. Rep.* 925. S. 12.

Attachment of
privilege, though
returnable on a
general return
day, is good to
save the statute.

An attachment of privilege sued out, returnable in eight days of the pacification, was replied to the statute of limitations; upon demurrer, it was held, that it was not a nullity, but merely informal, which the court on application would have amended; and that a suit actually begun, however informal or irregular,

regular, is sufficient to stop the statute of limitation. Judgment for plaintiff, 2 *Black. Rep.* 1132. *Lead-better v. Markland*

It is laid down in all the books, that an original must be sued out, but the denominations of the cases above stated have shewn otherwise, therefore sue out a *common capias*, and get it signed and sealed as usual, then leave it at the sheriff's office for a return of *non est inventus*; which being done, apply to the prothonotaries clerk for a roll, and enter thereon thus:

En-Land, (fl.) The Lord the King hath sent to his sheriff of London his writ closed in these words: to wit, George the Third, &c. (to the end of the *capias* and filacer's name); then say, At which day came here the aforesaid A. (the plaintiff) in his proper person, and the sheriffs, to wit, Sir Robert Taylor, Knight, and Benjamin Cole, Esquire, sheriffs of the said city, returned, that the aforesaid C. D. was not found in their bailiwick, and the said C. did not come. Take the roll to the prothonotaries office, and docket it, and pay 2s.; file the *capias* with the *cullos brevium*, pay 4d.

Entry of a *capias*.

An attachment of privilege is in the nature of an original writ, and when replied to, in order to save the statute, it is sufficient to shew the teste thereof, without any continuances, to the time of the declaration, 1 *Wils.* 167. in Error from *C. P.* Style 373. 4 n. but if a *lat.* or a *chafum fregit* be replied, it must be shewn that it was continued properly to make the foundation of the suit, *Carth.* 234.; and of that opinion was the court.

Attachment in nature of an original, and when replied to, it is sufficient to shew the teste.

Satisfaction.

IN term, apply to the clerk of the treasury if your roll is filed and judgment complete, for the roll, who will take same into court, and the secondary will enter satisfaction thereon, pay 1s. per hundred for the poor's box, 2s. to the prothonotary, and 1s. to the secondary.

Satisfaction how to be entered in term.

In vacation.

In vacation, the plaintiff must execute a warrant of attorney to two attorneys of the court, for that purpose; apply to the clerk of the judgments, who will prepare a *fiat*, and attend with the attorney before a judge, who signs it; then the clerk of the judgments will enter satisfaction on the roll, and he takes for all the fees, *1l. 7s. 8d.* But if the judgment be above ten years standing, he will take 5*s.* more as an *extra fee* due to the clerk of the treasury.

Ejectment.

The nature of the action.

THIS action is an invention by the court, (though fictitious) for the advancement of justice, and to force the parties to go to trial upon the merits, without being entangled in the nicety of pleading on either side.

The plaintiff and defendant are, in the first instance, merely nominal, *where there is a tenant in possession*, and the *lessor* of the plaintiff and the *tenant* in possession, are substantially and in truth the parties to the suit.

The great advantage of this fictitious mode is, that being under the controul of the court, it may be so modelled as to answer in the best manner every end of justice and convenience.

How to proceed, if no tenant in possession (except under the 4 Geo. 2.)

If there be no actual tenant or occupier of the lands (*except in the case of landlord and tenant, where the landlord has a right of re-entry as upon a lease, where half a year's rent is left unpaid*), the mode of proceeding will be by seizing a lease on the premises; and it is first necessary that the claimant do take possession of the lands, by making a formal entry thereon, to empower him to constitute a lessee for years; and being in possession of the soil, he, there on the land, seals and delivers a lease for years to such lessee, and having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the
pre-

previous possession, enters thereon afresh, and ousts him, or that some other person (either by accident or agreement before hand) comes upon the land, and turns him out, or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or the casual ejector, which-ever it was that ousted him, to recover back his term and damages.

Supposing *A.* to be the person claiming title to the premises, he may, if he pleases, sign the following letter of attorney to empower *D.* to execute a lease in his name, of the premises in question, to *E. F.* which is done upon the premises, *D.* and *E. F.* being only thereon, then *D.* after having executed the lease to *E. F.* leaves him in possession of the premises, who is turned out by *G. H.* to whom, whilst on the premises, *E.* delivers a declaration in ejectment.

Know all men by these presents, that I A. B. of, &c. The form of the gentleman, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint *G. D. of, &c.* hofier, to be my true and lawful attorney, for me, and in my name, to enter into and take possession of a certain messuage late in the tenure or occupation of *G. F.* and *J. H.* situate and being in the parish of, &c. in the county of *Oxford*, but now untenanted, and after the said *G. D.* hath taken possession thereof, for me, and in my name, and as my act and deed, to sign, seal, and execute a lease of the said premises, with the appurtenances, unto *E. F.* of the parish of, &c. *maister, to hold* the same unto the said *E. F.* his executors, administrators, and assigns, from the day of last past, before the date hereof, for the term of five years, at the yearly rent of a pepper corn (if lawfully demanded), subject to a proviso, to make void the same on payment by me of the sum of sixpence to the said *E. F.* In witness, &c.

Sealed and delivered, &c.

This indenture made, &c. between A. B. of, &c. The lease. gentleman, of the one part, and E. F. of, &c. of the

the other part, witnesseth, That the said *A. B.* for and in consideration of the sum of *5s.* of lawful money of *Great Britain*, to him in hand paid by the said *E. F.* at and before the sealing and delivery of these presents, the receipt whereof the said *A. B.* doth hereby acknowledge, *hath* demised, granted and to farm let, and by these presents *doth* demise, grant, and to farm let, unto the said *E. F.* his executors and administrators, all that messuage, &c. situate and being in the parish of _____ in the county of *Oxford*, late in the possession of *J. K.* but now untenanted, *to have and to hold* the said messuage and premises hereby demised, with the appurtenances, from the _____ day of _____ last past, before the date hereof, for and during, and unto the full end and term of five years, from thence next ensuing, and fully to be complete and ended, *yielding and paying* therefore yearly, and every year during the said term, unto the said *A. B.* or his assigns, the rent of one pepper-corn, if lawfully demanded, at the feast day of _____

Provided always, and upon this condition, that if the said *A. B.* shall at any time or times hereafter tender, or cause to be tendered unto the said *E. F.* his executors or administrators, the sum of *6d.* that then this present indenture shall be void, and of none effect (any thing herein contained to the contrary in any wise notwithstanding). In witness whereof the parties hereto have interchangeably set their hands and seals the day and year first above written.

Scaled and delivered as the act and deed of the above named *A. B.* by *C. D.* of _____ in the county of _____ hofier, by virtue of a letter of attorney to him for that purpose made by the said *A. B.* bearing date the _____ day of _____ instant, being first duly stamped in the presence of _____

If there be no letter of attorney made, then the owner of the land must go upon it before the essoign-day

day of the term, and there seal and deliver a lease to a friend of his as tenant, and at the same time, deliver him possession of the premises. This being done, get another person (a friend) to go upon the premises, and turn out the tenant, by thrusting him off the premises, and afterwards let such ejector remain on the premises, and whilst he continues there, serve him with a declaration in ejectment, in which make the *tenant*, the *plaintiff*, the *landlord*, the *lessor*, and the *actual ejector*, the *defendant*, and declare on the demise in the lease, and write a notice at the foot of the declaration, to appear and plead as hereafter.

The lease to try the title must be well made, sealed, and delivered, as other leases and deeds are done. The lease and entry may be made by the party lessor himself, if he be of full age, and not a feme covert, or by his attorney by a letter of attorney, wherein the lessor may seal and sign the lease, and seal and deliver the letter of attorney at one and the same time to some friend of his; and in this letter of attorney he must recite the lease, and give the attorney power to enter into the land, and there to deliver the lease of the l. s. as his deed, and then the attorney must do it in such sort as the lessor himself ought to do it; and he must not deliver it till he come to the land. The lease must be delivered upon the land; for if the lessor seal and deliver the lease before he hath made his entry upon the land, it is void. *Compl. Attorney*, 179, 180.

N. B. The lease being made, the *owner of the land* goes with such his *friend* to the manor or chief house, or stands within the door, or to the land, where no house is, where he *seals and delivers it to his friend*, and taking the ring, or any part of the door in his hand, delivers the lease, mentioning the house and lands, with the appurtenances which are contained in the lease, to his friend the *lessee*.

There is a diversity between *livery of seisin of land*, and the *delivery of a deed*; for if a man deliver a deed without saying any thing, it is a good deli-

very ; but to a livery of seisin of lands, words are necessary, as taking in his hand the deed, and the ring of the door (*if it be of an house*), or a turf or twig (*if it be of land*), and the lessee laying his hand on it, the lessor says to him, "*Here I deliver to you seisin of this house, or of this land, in the name of all the land contained in this deed, according to the form and effect of the deed.*" If you cannot come into the house, you may deliver the lease upon the lands, in the name of the house and land contained in the lease.

Where it cannot be proved that the lessee, after the lease made, did enter and was possessed, this action will not be maintainable ; and therefore it is necessary to say something of the entry of the lessee.

1st, He must make such an entry as to gain the possession ; for he cannot be ejected out of the possession of that wherein by law he never was.

2d, His possession must continue ; for it upon sealing of the lease, and the delivery of it to the lessee upon the premises, the lessor leaves him upon the house and land, and that he be out or come away, &c. and another enter, whether it be a continuance of the same tenant in possession, or the entry of a stranger, here his possession is not continued, and any of those parties is ejectors.

For the ejectors take this ;

The entry of a man upon the land after the lease sealed, or the putting in the beast upon the land is an ejectment.

The continuance of the same tenant in possession that was in the time of the sealing of the lease, is an ejectment, and the tenant an ejector.

Where a lease is made to try the title, and the servants of the former possessor enter with their master's carts to do their utmost, and the action is brought against the master, it is maintainable, without proof of the master's commandment for this entry. *Campl. Attorn. and Solicitor*, 180.

The

The declaration is the same as others, only instead of *John Doe* and *Richard Roe*, the plaintiff and defendant are, in this case, the real persons; as for instance, *E. F.* the lessee of the premises, will be plaintiff, and *G. H.* the defendant; *A. B.* will be the lessor of the plaintiff; and instead of the common notice at the end, put this: Declaration.

Mr. G. H.

Take notice, that unless you appear in his Majesty's court of Common Bench, at *Westminster*, within the first four days of next Trinity term, at the suit of the above named plaintiff, *E. F.* and plead to this declaration in ejectment, judgment will be thereon entered against you by default. If in the country, eight days.

Yours, &c. C. F.

After service, there need no affidavit of these facts or of service, nor any motion for judgment; but on the first day of term give a rule to plead, as in common cases, and at the expiration, if no appearance and plea, sign judgment.

N. B. This is more concise than, and different from, the King's Bench practice, as that court requires an affidavit of all the facts, and motion.

Where there is a tenant in possession, no actual lease is made, entry or ouster by the defendant, but all are merely ideal, for the sole purpose of trying the title; therefore, in order to proceed against him, prepare a declaration, ingross it on a treble penny stamp paper, the copy of which (upon stamp), you serve the tenant with; if there are more than one, each tenant must be served with a copy; but if the man is not at home, his wife will do. 2 *Black. Rep.* 800. *Barnes* 178. 194. 2 *Wils.* 263. If the tenant himself be served, it need not be on the premises; but otherwise if the wife be served, *Barnes* 175, 176. 188. 190. 192. Where there is a tenant in possession, no leave is necessary.

It may be served on the tenant's father, son, daughter, sister, or servant, on the premises, provided May be served on tenant's father, &c.

vided the tenant acknowledges the receipt thereof, which must be contained in the affidavit. *Barnes* 176. At the time of service, read over or explain the notice at the foot thereof.

Abconding tenants, &c.

If the tenant absconds, or keeps out of the way, to avoid being served, it is usual to serve a declaration on some person residing at his house, or if that cannot be done, to affix the same on his door, and then, upon an affidavit of the circumstances, to move the court for a rule, why such service should not be deemed sufficient; and the court will prescribe the mode of serving the rule, which is generally made absolute on an affidavit of the service. *Barnes* 188. 190.

In ejectionments in *Middlesex* and *London*, the tenants to be tried when to appear.

By rule T. 32 *Cur.* 2. "It is ordered, That the plaintiffs or their attorneys, or the parties which cause declarations to be delivered in ejectionment, in the county of *Middlesex* and *London*, upon such delivery thereof, shall tell the tenants in possession of the tenements in question respectively, that they are to appear by an attorney of this court, in defence of the title thereof, in the beginning of the term next after the delivery of such declaration. And it is further ordered, That the aforesaid plaintiffs, for the future, shall take nothing by motion made in this court for judgment against the casual ejector for default of appearance, unless such motion be made within one week next after the first day of every *Michaelmas* term, and every *Easter* term, and within four days next after the first day of *Hilary* term, and of every *Trinity* term."

Motion for judgment, when to be made.

N. B. This does not extend to ejectionments where the possession is vacant; there the motion may be made any day in term. *Barnes* 172. or on *Stat.* 4 *Geo.* 2.

Cases relating to the service of declarations in ejectionment, and the court's proceeding thereon.

What is good service.

Serjeant *Kettleby* moved, upon an affidavit of tendering the declaration to *Jane Reynolds*, widow, which

which she refusing to accept, it was left on the floor in her presence; and she retiring into a parlour, and shutting the door, the person serving read the subscription aloud, so as she might hear it, which was held sufficient. *Barnes* 185.

The tenant in possession secreting himself in the house, so that he could not be personally served with a declaration in ejectment, a rule was made to shew cause why service of it on the servant at the house should not be good; the rule to be served in the same manner. *Barnes* 188.

Declaration was delivered to tenant in possession in *Trinity vacation*, with notice to appear in *Hilary term* then next; tenant, in *Michaelmas* between, entered an *appearance*, but proceeded no further; and four days after *Hilary term*, plaintiff finding no appearance, no common rule entered into, or plea, signed judgment: tenant moved to set aside judgment, but it was held to be regular; but as the title had not been tried, it was set aside on payment of costs, entering appearance of the proper term, and into the common rule. *Barnes* 250.

On affidavit, that one of the tenants was a lunatic; that one C. lives with, transacts her business, and has the sole conduct thereof, and of her person, but would not permit deponent to have access to her with the declaration in ejectment; whereupon it was delivered to C. rule that she and C. both shew cause why this service should not be good, and service of this rule on him be deemed good service. *Barnes* 190, 191.

On affidavit, that tenant in possession secreted himself, to prevent his being served with ejectment, and could not serve it, though frequent endeavours had been used; and that the declaration had been delivered to his daughter (who kept his house, being a public house); and that she was acquainted with the contents of the subscription; a rule was made, for the tenant to shew cause why such former service should not be deemed good service; the rule to be served on the daughter at the house. *Barnes* 192.

The like rule granted on service on C. the person who had the care of a lunatic.

The like rule on the service of the tenant's daughter, tenant having secreted himself.

Service on churchwardens and overseers, who rented a Poor-house, held good.

When to be served.

Service on the churchwardens and overseers of the parish, who rented an house for harbouring some of the parish poor, and did not otherwise occupy the house, than by placing the poor in it, deemed sufficient. *Barnes* 181.

It is to be served before the *assign day* of every term (if in *London* or *Middlesex*), or he is not bound to plead till the next term, after service: and in the country, it must be served before the *assign day* of *Hilary* or *Trinity term*, or he is not bound to plead, so as to go to trial at the assizes; but the delivery on a *Sunday*, or *assign day* of that term wherein defendant is to appear, will not do.

If a country ejectment is served on the tenant to appear in *Michaelmas* or *Easter term*, the plaintiff must make his motion for judgment in that term he has made the notice for his appearance, or he can have no rule for judgment.

When to make the notice to appear.

If the premises be in *London* or *Middlesex*, the notice must be made to appear the *first day* of the *next term* after service; for it made generally, the tenant in possession has the *whole term* to appear in; but if the tenements lie in any other county, the notice must be to appear as of the *next term generally*.

When notice to quit requisite, and when not.

Where the tenant holds the premises of the lessor of the plaintiff, it is sometimes necessary to give him notice to quit possession, in order to maintain an ejectment. Here we may observe, that demises, where no certain term is mentioned, are held to be tenancies from *year to year*, which neither party can determine, without reasonable notice to the other. This notice is, in most counties, *six months* preceding that part of the year when the tenancy commenced; and therefore it hath been holden, that half a year's notice to quit possession must be given to such tenant, before the landlord can maintain an ejectment, unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenants, in which case no notice is necessary. And the same law will apply to the executor of such a tenant. *Vide Black. Com.* 2. v. 147.

3 Wils. 25. But after the expiration of a lease for a certain term, the tenant continuing in possession is deemed a trespasser; and therefore an ejectment, which is an action of trespass, may be brought without any notice to quit: so a mortgagee need not give any notice to quit, if he only mean to get into the receipt of the rents and profits, even though the mortgage be subsequent to the lease; but in such case, he will not be suffered to turn the tenant out of possession. *White Ex-dem Whatley v. Hawkins.* M. 14 Geo. 3. Vide *Dougl. Rep.* 25.

On a motion for a new trial in ejectment, the case turned on the sufficiency of the notice to quit, which was as follows: “*I desire you to quit the possession, at Lady-day next, of, &c. or I shall insist upon double rent for the same.*” Verdict for plaintiff. It was contended on the part of the defendant, that the notice was conditional, and that it was therefore optional in the defendant either to quit, or keep possession on the payment of double rent. Lord Mansfield said, it clearly means to refer to the statute, although the penalty given by the statute is not double rent, but double the yearly value, which is more favourable to landlords, for double rent would be no penalty on the expiration of some leases. The additional words only prove the landlord’s anxiety to get into possession. It is an emphatical way of enforcing the notice, and shewing the tenant that he is in earnest, by informing him of the legal consequence, if he held over. *Doe v. Jackson and others.* *Dougl. Rep.* 167.

It has not been doubted of late years, that half a year’s notice to quit possession must be given to a tenant at will, before the end of which time an ejectment will not lie to turn him out of the farm. The same law was held in the case of an executor of a tenant at will. *Parker v. Constable.* 3 Wils. 25. per *Wilmst.* C. J.

And such half year’s notice ought to end the day of the entry made by the defendant.

P p

By

I desire you to quit, &c. or shall insist upon double rent, held good notice.

Half a year’s notice to a tenant at will to quit a farm.

When such notice ought to end.

Custom of *London*.

By the custom of *London*, if the premises are above the yearly rent of 40s. half a year's notice must be given to quit; if under 40s. a quarter's notice. 2 *Sid* 20.

Tenant at all events for a year, if above 40s.

I believe it is now settled, that if a man enters a house in any place as a tenant at will, half a year's notice must be given him to quit, which is to expire the day he entered; therefore he is a yearly tenant at all events.

Declaration in ejectment on one demise.

To be ingrossed on a trelle penny stamp paper.

London, (ss.) *Richard Roe*, late of *London*, yeoman, was attached to answer *John Doe* in a plea, wherefore with force and arms, &c. he entered into five messuages, and one acre of land, with the appurtenances, in the parish of *Saint Dunstan in the West*, in the said city, which *John Sibthorpe* demised to the said *John Doe*, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said *John Doe*, and against the peace of our sovereign Lord the now King; and whereupon the said *John Doe*, by *A. G.* his attorney, complains, *For that whereas* the said *John Sibthorpe*, on the 2d day of *April*, in the twenty-second year of the reign of his said Majesty, at the parish aforesaid, in the county aforesaid, had demised to the said *John Doe* the said tenements, with the appurtenances, *To have and to hold* the said tenements, with the appurtenances, to the said *John Doe* and his assigns, from the 1st day of *April* then last past, to the full end and term of five years from thence next ensuing, and fully to be complete and ended; by virtue of which said demise, the said *John Doe* entered into the said tenements, with the appurtenances, and was possessed thereof; and the said *John Doe* being so possessed thereof, the said *Richard Roe* afterwards, to wit, on the said 2d day of *April*, in the twenty-second year aforesaid, with force and arms (that is to say), with swords, staves, and knives, entered into the said tenements, with the appurtenances, which the said *John Sibthorpe* demised to the said *John Doe*, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said

said *John Doe* out of his said farm, and other wrongs, &c. to the grievous damage, &c. and against the peace, &c.; whereupon the said *John Doe* saith, that he is injured, and hath damage to the value of 10*l.* and thereupon he brings suit, &c.

Mr. T. G. I am informed that you are in pos-^{Notice.} session of, or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof; and I being sued in this action as a casual ejector, and having no claim or title to the same premises, do advise you to appear, the * first * ^{If in the country, try, next Triality term."} day of next *Trinity* term, in his Majesty's Court of Common Bench at *Westminster*, by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me, and you will be turned out of possession.

Your loving friend,

Richard Roe.

Ejectment lies of a kitchen, *Noy* 109. A bed-chamber or lodging-room, by the name of one room, being in such a house, in the middle story of the said house, and it lies of *one room* only. 3 *Leon.* 210. So of a house called by the name of the Three Kings in *A Str.* 195.; of an apple loft or store-house. *Cro. Eli.* 854. *Cro. Car.* 614. 1 *Lev.* 58.

If it be of a rectory, say, He entered into the rectory ^{Rectory.} of the parish church of *O.* in the county of *C.*; and also into two messuages, ten barns, ten out-houses, ten gardens, ten orchards, fifty acres of arable land, fifty acres of meadow land, fifty acres of pasture land, and fifty acres of other land, with the appurtenances, situate and being in the said parish of *O.* in the county of *C.* aforesaid; and also into all and singular the tithes of corn, grain, hay, wood, grass, wool, lambs, and calves, arising, growing, renewing, increasing and happening, within the said parish of *O.* and within the bounds, limits, and titheable places of the said rectory.

Vicarage.

If of a vicarage; he entred into three messuages, three barns, three stables, three orchards, three gardens, two hundred acres of land, two hundred acres of pasture land, two hundred acres of meadow land, and two hundred acres of arable land, with the appurtenances, situate and being in the parish of *I.* in the said county; and also into all the tithes of corn, grain, hay, grass, wool, lambs, potatoes, parsnips, turnips, and carrots, growing, renewing, and happening within the limits and titheable places of the vicarage or parish-church of *I.* in the said county.

In an ejectment for a *rectory* or *vicarage*, you must shew a demise to be made by deed, though no lease is actually made, as thus; *For that whereas* the said *John Beech*, on the 2d day of *February*, in the year of our Lord 1783, at the parish aforesaid, in the county aforesaid, by his indenture sealed with his seal, and to the court of our Lord the King now here shewn, bearing date the day and year aforesaid, had demised, &c.

Manor.

If it be of a manor, the description of the premises are thus: "*Entred into the manor of F. in the said county, with the rights, members, and appurtenances thereunto belonging, and into fifty messuages, fifty cottages, fifty barns, fifty stables, two mills, fifty gardens, fifty orchards, three thousand acres of pasture, three thousand acres of meadow, one thousand acres of wood, five hundred acres of marsh land, five hundred acres of furze and heath, and common of pasture for all manner of cattle, with the appurtenances, in the parish of F. in the said county.*"

Declaration on a double demise.

Staffordshire, (H.) *Richard Roe*, late of *Stafford*, in the county aforesaid, yeoman, was attached to answer *John Doe*, in a plea, wherefore, with force and arms, he entered into one messuage, one orchard, one garden, seventy acres of land, seventy acres of pasture, and seventy acres of meadow, with the appurtenances in the parish of *F.* in the said county, which *J. C.* demised to the said *John Doe*, for a term of years which is not yet expired; And also,

also, wherefore, with force and arms, he entred into one other messuage, one other orchard, one other garden, &c. (as before) with the appurtenances in the parish of *F.* in the said county; which *T. P.* demised to the said *John Doe*, for a term which is not yet expired, and ejected him from his said several farms, and other wrongs to him then and there did, to the great damage of the said *John Doe*, and against the peace of our Lord the now King; and whereupon the said *John Doe*, by *J. K.* his attorney, complains, *That whereas*, the said *J. G.* on the 13th day of *February*, in the year of our Lord 1782, at the parish of *F.* aforesaid, in the county aforesaid, had demised to the said *John Doe*, the said tenements first above mentioned, with the appurtenances, *To have and to hold*, the said tenements first above-mentioned, with the appurtenances, to the said *John Doe*, and his assigns, from the 12th day of *February* then past, for and during, and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended: And also whereas the said *T. P.* on the 13th day of *February*, in the year of our Lord 1782, at the parish of *F.* aforesaid, in the said county, had demised to the said *John Doe* the tenements aforesaid, secondly above mentioned, with the appurtenances, *To have and to hold*, the same with the appurtenances, to the said *John Doe*, and his assigns, from the 12th day of *February* then past, for and during, and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended; By virtue of which said several demises, the said *John Doe* entered into the said several tenements, with the appurtenances, and was possessed thereof, and being so possessed thereof, he the said *Richard Roe*, afterwards, to wit, on the said 13th day of *February*, in the year aforesaid, with force and arm-, &c. entered into the said several tenements, with the appurtenances, in and upon the possession of the said *John Doe*, his said term therein not being yet expired, and ejected the said

John Doe out of his said several farms, and other wrongs, &c. to the great damage, &c. and against the peace, &c.; whereupon the said *John Doe* says he is injured, and hath sustained damage to the value of 10*l.* and therefore he brings his suit, &c.

Add the notice as in the last, to appear generally, as of the term.

How the premises are to be inserted in the declaration.

In this declaration the law requires, that the *thing demanded* be to specified, that the sheriff may certainly know what to give the possession of, if plaintiff should recover, for it would be in vain, if execution could not be had of the thing specifically demanded. 2 *Lord Raym.* 1470. 2 *Str.* 908.

Such a very exact description is not equally necessary in this action, as in a *præcipe*. In this action, the plaintiff is to shew the sheriff, and is to take possession, at his peril, of only what he has title to; if he takes more than he has recovered, the court will in a summary way set it right. 1 *Burr.* 629.

In what county to be brought.

Demise.

It must be brought in the county where the lands lie, and the declaration must set forth the particular parish; and the day of the demise must be laid after the title accrued, otherwise plaintiff will be non-suited, and the plaintiff must lay the commencement of his supposed lease, to have been precedent to the ejectment by the defendant. 1 *Sid.* 8. 2 *New Abr.* 171.

In ejectment on the demise of an heir by descent, the demise was laid the day his ancestor died, and held to be well enough. 3 *Wils.* 274. If my ancestor die at five o'clock in the morning, I enter at six, and make a lease at seven, it is good. *Ibid.*

If title accrues in *Easter vacation*, yet you may deliver declaration as of *Easter term*.

If the title of the lessor or plaintiff, accrue in *Easter vacation*, yet the plaintiff may deliver his ejectment as of *Easter term*, and shall recover thereon, because he makes up his issue, or takes judgment as of the *next term*, otherwise the act of the law, which supposes the writ sued out as of the first day of *Easter term*, before a title accrued to plaintiff, would be an act or injury to him, and delay his right; for a man ejected out of a lease made in term time, would

would not complain till term was over. 2 *Vent.* 174. It must be brought within twenty years. 21 *Jac.* 1. *Within what time to be brought.*
c. 16. *Sid.* 432.

When the declaration is delivered, make affidavit of the service thereof on the tenant, or his wife, and annex a copy of the declaration on a treble penny paper, and move for judgment against the casual ejector, which is done by giving a serjeant 10s. 6d. with the affidavit of service, who signs his name thereon, and gives it to one of the secondaries with the affidavit; but first take a copy of the declaration, if it be a country cause. *N. B.* It is to be delivered by a serjeant in open court. *How to move for judgment.*

In the Common Pleas,

John Doe, on the demise of *J. P.* plaintiff,
 and

Richard Roe, defendant.

A. B. of in the county of Affidavit of the service.
 maketh oath and saith, That he this deponent did on the day of last, personally serve *J. B.* tenant in possession of the premises, in the declaration hereto annexed mentioned, with a true copy of the declaration, and notice thereunder written, hereto annexed, and at the same time this deponent (read to him the notice thereunder written), or it may be, acquainted the said *J. B.* of the intent and meaning of the said declaration, and notice thereunder written.

To be sworn before a judge if a town cause, and before whom to be sworn.
 a commissioner, if in the country, ingrossed on a treble 6d. stamp paper. If the wife was served, If wife served.
 then say, "*served Mary the wife of J. B. the tenant in possession of the premises,*" &c.

Affidavit of service on *A. B.* tenant, or *C.* his wife, not sufficient, *Barnes* 173.; nor on the wives of *A. B.* &c. who or one of them are tenants. *Ibid.* 174, 175. But on the wife of tenant in possession, as the informed deponent, and as he verily believes, held sufficient. *Ibid.* 194.

Motion for judgment in town, where to be made.

Must be made within that term wherein the tenant had notice to appear. *Salk.* 257.

If in the county.

If in a country where the assize is, only once a year.

If term ends *Wednesday*, all *Monday* to appear.

When judgment may be signed.

If no appearance in time, how to sign judgment.

If the tenements lie in *London* or *Middlesex*, and notice to appear the first day of term, you may on that day move for judgment, or within *one week* after *Michaelmas* or *Easter term*, and within *four days* next after the first day of *Hilary* or *Trinity term*, pursuant to the rule of *Trin.* 32 *Car.* 2.; and then the tenant has but four days inclusive to appear in, next after the motion. If the notice be general, then the tenant has the *whole term* to appear in.

If the tenements lie in any *other county* than *London*, or *Middlesex*, and the declaration be delivered before the essoign day of *Easter* or *Michaelmas term*; yet the tenant has *four days* after the end of the next *issuable term* (*viz.*) *Hilary* or *Trinity*, to appear; and if in a county where the assizes are held but once a year, yet tenant has *four days after the end of the term, next preceding the assizes*, to appear; and your motion will be time enough, if made the last day of the issuable term.

If the term ends on a *Wednesday*, you have all *Monday* to appear in; and judgment cannot be signed till *Tuesday afternoon*.

It cannot be signed until the *afternoon* of the fifth day, after the end of the term of which the declaration is, *Sayer's Rep.* 303.; pay filing the affidavit in a country cause, 2s.; no rule to plead is given, as in other cases.

If the tenant does not appear, and file his plea within the time limited (*for which search the plea book at the prothonotaries office*), draw up rule for judgment with the secondary, pay 7s.; enter the declaration as far as the names of the plaintiff and defendant, upon a double 2s. 6d. stamp paper; make out warrants of attorney, and file them, the clerk marks the judgment-paper; then take judgment-paper to the prothonotaries office, pay signing 12s. 8d.; and the clerk will give you a roll to enter up the judgment. *N. B.* No appearance is entered with the filacer; when this is done, you may make out a writ of possession; pay signing with pro-

prothonotaries 1s. 4d. seal 7d.; no *præcipe* is requisite.

It was formerly held, that a declaration in ejectment could not be altered or amended after once delivered, in the most trivial matters; but it has since been held, that an ejectment is a mere fictitious action, and the demise mere matter of form, nor does it exist; and on application, the demise was ordered to be amended, but this was to save the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment. 4 Burr. 2447. 2 Burr. 1162.; therefore as the demise may be altered, there can be no doubt but that other parts less material may also be amended, the action being invented under the controul of the court, for advancement of justice, and merely to try the right in question. 1 Burr. 665. At this time what amendments may be made in the *King's Bench*, the like may be done in this court, I have no doubt. *Vide Pract. Reg. C. P.* 16, 17. 175.

The term of an ejectment enlarged, being so laid, that it had expired twelve years before the action brought, on payment of costs; a special jury being struck, and the parties gone down to the assizes before mistake discovered. 2 Black Rep. 940. *per cur.* An ejectment is the creature of the court, and open to every equitable regulation for expediting the true justice of the case. *Ibid*

If the tenements lie in London or Middlesex, and the notice be to appear the first day of term, tenant has four days to appear after motion; if, of the term generally, then the whole term.

If in the country, four days after the issuable term, viz. Hilary or Trinity, or if it be in a county where the assizes are but once a year, then four days after the end of the term next preceding the assize. It is said, that the tenant cannot appear after the time allowed by the common rule for appearing is expired. *Say. Rep.* 151. *sed qu.*

The secondary on request, to shew his alphabetical paper of ejectments, moved or delivered into court. *R. Hil.* 2 Geo. 2.

How to appear
for tenant.

Get a blank consent rule from the stationers, pay 2d. ; fill it up in this manner, if you mean to defend for all the premises mentioned in the declaration.

In the Common Pleas.

Michaelmas Term, in the twenty-fourth year of the reign of King George the Third.

Consent rule.

Issex, to wit, John Doe, on } It is ordered
the demise of *John Staples* against } by consent of
Roe, for four messuages, four barns, } S. U. attorney
four stables, five hundred acres of } for the plaintiff,
arable land, five hundred acres of } and A. G. at-
pasture, and twenty acres of furze } torney for *John*
and heath. } *Nix*, who claims

title to the tenements in question, that the said *John Nix* shall be admitted defendant; and that the said *John Nix* shall immediately appear by his said attorney, who shall receive a declaration, and plead thereto the general issue this term; and that at the trial to be had thereon, shall appear in his proper person, or by his counsel or attorney, and confess the lease, entry, and ouster, of so much of the tenements specified in the plaintiff's declaration, as are in the possession of the said defendant, or his tenants, or any person claiming by or under his title, or that in default thereof judgment shall be thereupon entered against the defendant *John Doe* the casual ejector; but proceedings shall be stayed against him, until default shall be made in any of the premises; and by the like consent, *It is further ordered*, That by reason of any such default, the plaintiff shall happen to be nonsuited upon the trial, the said *John Nix* shall take no advantage thereof, but shall thereupon pay to the plaintiff, costs to be taxed by the prothonotaries; *And it is further ordered*, That the lessor of the plaintiff shall be liable to the payment of costs to the said *John Nix*, by the court here to be in any manner allowed or adjudged.

By the Court.

Ejectment.

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N.B. This is signed by the lessor S. U. Attorney of the plaintiff's attorney afterwards, when he draws up the rule; A. G. Attorney but defendant's attorney signs it before the plea be left. Jant.

Originally, if you defended for part of the pre- How to defend
mises in the declaration, *the whole was mentioned in* for part.
the rule, but a note in writing was delivered, to the
plaintiff's attorney, *what the defendant meant to insist*
on at the trial; but now you mention in the margin
of the rule, *that part of the premises only which you*
mean to defend for; and at the end, say, "Part of
" *the premises mentioned in the declaration,*" and the
rule drawn up by the secondaries will be, that
"unless *John Nix*, tenant in possession of part of the
"premises in question, shall appear and plead to is-
"sue on next after the end of the term,
"let judgment be entered for the plaintiff against
"the now defendant *Richard Roe* by default; but
"execution shall issue for such part of the premises
"only as are in their respective possessions."

By 11 Geo. 1. c. 19. s. 12. "Tenants are ob- Tenants must
"liged to give notice to their landlords of a decla- give notice to
"ration in ejectment being delivered, under pain of their landlords.
"forfeiting three years improved, or rack-rent of
"the premises held by the tenant."

Take your consent, rule, and plea of general is-
sue of Not Guilty to the trial of the county, with
a *præcipe* for the appearance of the defendant thus: Præcipe for the
"Middiejen, (ff) *appearance for Joseph Nix,* appearance.
"at the suit of *John Doe*, on the demise of *Edward*
"Staples," he will sign your rule, and write on it
"appearance entered," pay 2s. 6d. then leave the
"plea and rule at the prothonotaries office, pay
"filing 2s."

In the Common Pleas,

Hilary term, in the twenty-fourth year of the reign
of King George the Third.

Nix ats. *Doe* on } And the said *Joseph Nix*, Plea.
the demise of *Staples*. } by S. U. his attorney, comes
and defends the force and in-
jury

jury when, &c. and says, That he is not guilty of the trespass and ejectment above laid to his charge, in manner and form as the said *John Doe* hath above thereof complained against him, and of this he puts himself upon the country, &c.

Any person claiming title, may be made defendant with the tenant.

Any person claiming right to the premises in question, may, with leave of the court, be made a defendant with the tenant in possession, but the court never permits such person to defend alone without the tenant.

Landlord empowered to make himself defendant.

But great inconveniencies having happened by tenants refusing to appear to such ejectments, or suffer their landlords to take on them the defence thereof. By *Stat. 11 Geo. 2. c. 19.* "The court may suffer the landlord to make himself defendant, by joining with the tenant, in case he shall appear; but if the tenant shall refuse to appear, judgment shall be signed against the casual ejector for want thereof; but if the landlord of any part of the land, &c. shall desire to appear by himself, and consent to enter into the like rules, that the tenant, in case he had appeared, ought to have done, then the court shall permit such landlord so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall further order therein."

The word *landlord*, here means not every person claiming title, but a person who is in some degree in possession, as receiving rent, &c. *Barnes 193, 194. Roe v. Doe.*

Court refused to make a person who claimed title defendant, instead of the late tenant, who had quit-
ted the possession. *Barnes 135.*

Motion that landlord might be made defendant, without tenant in possession, who refused to appear, denied; but common rule granted to add landlord to tenant. *Barnes 172.*

In cases where landlord is permitted to defend without tenant, the reason of judgment against the casual ejector, by *Stat. 2. Geo. 2. c. 14. 15;* That under it, after the end of the suit, the plaintiff may obtain

obtain possession of the premises sued for, which he could not do by virtue of a judgment against a person out of possession. *Barnes* 208.

Landlord is to enter into the common rule by consent, and he is to be considered in all respects in the same case as tenant in possession. *Barnes* 187.

How to appear for the landlord. Give brief to serjeant for the landlord. *That the LANDLORD may*

be made defendant with the TENANT, if he appears,

and if the tenant does not appear, then that he may

appear by himself, and enter into the common rule,

and defend his title." Serjeant 101. 6d. N.B. This

is done by a serjeant's hand, and there needs no affidavit for the purpose, as mentioned in the books; draw

up the rule with the secondaries, pay 9s. 6d. copy it,

and annex it to the plea: *"Add also the common con-*

sent rule thereto;" in which you will insert *"both*

names, if tenant appears," and file appearance and

plea as before; *if tenant does not appear,* then only

the landlord's name.

Where the landlord is made defendant, the plaintiff must prove the defendant's tenant in possession of the premises. *Wils.* 220.

After verdict against the landlord, or if plaintiff be nonsuited for not confessing, the court will, on producing the *posse* on motion, make rule absolute, to take out execution against the casual ejector in the first instance. *Barnes* 181, 182. 183.

The new defendant may give a rule to reply, and nonpros the plaintiff, but can have no costs, unless the lessor of the plaintiff has joined in the rule by consent. 2 *Black. Rep.* 763.

How to proceed to trial. Take consent, rule, and plea from the prothonotaries office, carry the rule to

premises, and inserting the real defendant's name) on treble 6d. pay for same 9s. 6d. then make up the issue, charge on the back thereof for the copy 4d. per sheet, and half the consent-rule. Ingross same on a treble 1d. and deliver it to defendant's attorney, with the usual notice of trial; if he pays for the issue, pro-

proceed as in other cases; if not, then sign judgment against the casual ejector, as if no plea had been entered, first drawing up the rule for judgment with the secondaries.

Issue.

The form of the issue is the same as others, only say, instead of a plea of trespass on the case, "*in a plea of trespass and ejectment,*" and the same time for notice of trial, is also allowed.

Infant lessor must name a guardian.

If the lessor of the plaintiff is an infant, after the plea is filed, you may move the court, or have a summons "*to shew cause why further proceedings should not be staid, until a sufficient guardian is appointed for the lessor of the plaintiff, who will undertake to pay such costs, as may be adjudged to him, and that in the mean time all proceedings be staid, till a good plaintiff be named, or security to be approved by the prothonotaries, be given by the infant lessor, for securing costs to the defendant, in case of a nonsuit or verdict for him.*" Barnes 183. In this case a guardian is appointed, as in all other cases.

If judgment is signed by default, and the tenant has not delivered the ejectment to his landlord, he may apply to set it aside.

If judgment be signed by default against the casual ejector (the landlord may move to set it aside *if the tenant has not given him the ejectment*), and they will make tenant pay the costs, for the possession ought not to be changed where there has been no trial, nor opportunity of trying. *Vide 4 Burr. 1997.*

Record.

The record in ejectment is made up in the same manner as others, and the *placita* is the same; in the *jurata* say, "*in a plea of trespass and ejectment.*" if plaintiff has a verdict, tax the costs as in other cases.

The *will* in which the demised lands lie, though omitted in the declaration, shall, after verdict for the plaintiff, be collected from the *will*, in which the ejection is laid to have been committed. 2 *Black. Rep.* 706 *Vide 4 Burr. 2224.*

In ejectment, it is said, that the court will seldom grant a new trial where the verdict is for the defendant, because the plaintiff may bring a new ejectment; but where it is for the plaintiff, a new trial is often granted; for the consequence of no granting

granting a new trial is, the alteration of the possession of the premises: but as new trials were instituted to prevent expence to the parties, and for the purpose of doing complete justice, I should think in ejectment, as well as other cases, a new trial ought to be granted (especially if that justice has not been done).

Where the plaintiff is nonsuited, by reason of the defendant's not confessing lease, entry, and ouster, the costs are taxed on the rule by consent, and judgment signed against the casual ejector, the same as if no plea had been pleaded. *Barnes* 182.

Where a verdict in ejectment is for the defendant, or the plaintiff becomes nonsuited upon evidence, a *ca. fa.* must be made out against the plaintiff, and shewed to his lessor; and the costs must be demanded of the lessor, *Barnes* 182. if not paid, affidavit of the costs being allowed, and the demand made at same time, you may move for an attachment.

If the plaintiff be nonsuited on the merits, he may pay the costs to which of the defendants he pleases. *Str.* 516.

If there be a verdict for the plaintiff, he may have a *ca. fa.* or *fi. fa.* for the costs, and a writ of *hab. fac. poss.* afterwards, or writ of possession *fi. fa.* or *ca. fa.* together, in one writ.

Execution must be taken out according to what in right and justice is really recovered, and cannot be taken out for more: for the judgment is not to be for a moiety only, it must be that he recover his term. *Vide* 1 *Burr.* 366.

If there are several defendants for the same premises, and some appear and confess, but others do not, the practice is, to proceed against those who do appear, and to enter a verdict for the rest; but then the cause of that verdict is indorsed on the *postea*, which, as to them, intitles the plaintiff to judgment against the casual ejector. *Ld. Raym.* 729. *Vide* 1 *Barnes* 118.

Judgment by nil.
dicit, with a re-
mittitur dampna.

And the said *Richard*, by *S. U.* his attorney, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John Doe*, but makes default, by which the said *John Doe* remains therein undefended against the said *Richard Roe*, for which the said *John* ought to recover against the said *Richard*, his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and upon this the said *John* freely here in court remits to the said *Richard* all such damages, costs, and charges, as he the said *John* hath sustained, by occasion of the trespass and ejectment aforesaid, therefore the said *Richard* is free from those damages, costs and charges, &c.; and upon this the said *John* prays the writ of our Lord the King, to be directed to the sheriff of the county aforesaid, to cause him to have his possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted to him, returnable here on the morrow of *All Souls*, &c.

A writ of possession.

N. B. To be ingrossed on a 2s. 6d. stamp parchment, paying 1s. 4d. seal 7d.; no procipe.

George the Third, &c. to the sheriff of *Middlesex*, greeting: Whereas *John Doe*, lately in our court, before our justices at *Westminster*, by the consideration of the said court, recovered against *Richard Roe* his term yet to come, of and in one messuage, &c. (*here describe the parcels, as in the ejectment exactly*), with the appurtenances, situate, lying, and being in _____ in your county; which *John Charles*, on the 2d day of *April*, in the twenty-third year of our reign, demised to the said *John*, for a term of years which is not yet expired, to hold from the 1st day of *April* then last past, until the full end and term of five years from thence next ensuing, and fully to be complete and ended; by virtue of which demise, the same *John Doe* entered upon the same tenements, with the appurtenances, and was possessed thereof, until the said *Richard* afterwards, to wit, on the same 2d day of *April*, in the twenty-third year aforesaid, with force and arms entered into the said tenements,

ments, with the appurtenances, and then and there ejected, drove out, and removed him the said *John Doe* from his said farm, his said term then and there not being expired, and him the said *John* hath withheld from his possession thereof, and still doth withhold, whereof the said *Richard* is convicted: Therefore we command you, that without delay you cause the said *John Doe* to have his possession of his term aforesaid, yet to come of and in the tenements aforesaid, with the appurtenances, and in what manner you shall have executed this our writ, make appear to our justices at *Westminster*, on the morrow of *All Souls*, and have there this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 29th day of *July*, in the twenty-third year of our reign.

George, &c. (to the end of the writ of possession, as far as the return day), then say, We also command you, That of the goods and chattels of the said *C. D.* in your bailiwick, you cause to be made 26*l.* which were adjudged to the said *John Doe*, by the consideration of our said court, for his damages, which he had sustained by reason of the trespass and ejectment aforesaid; and have you the said monies before our justices at *Westminster*, at the said time, to render to the said *John Doe*, for his damages aforesaid, whereof the said *C. D.* is convicted; and have there this writ. Witness, &c.

Writ of possession, and sh. sh. for costs.

The writ of possession has relation to its teste, though it be not actually sued out till after the death of the lessor of plaintiff; yet if tested before his death, it is regular. 4 *Burr.* 1371. The legal relation to the day of the teste, is proper to be supported in maintenance of a writ of possession, on a judgment in ejectment. *Ibid.*

Hab. fac. poss. has relation to its teste, tho' not actually sued out till after the death of plaintiff's death, yet it is regular.

To be ingrossed on a 2*s.* 6*d.* stamp parchment, and signed with the prothonotaries, pay 1*s.* 8*d.* teal 7*d.*; no *præcipe* is requisite.

The sheriff grants a warrant on this writ; pay Warrant. 2*s.* 4*d.* and he will put the lessor of the plaintiff in possession.

The writ of possession will serve for a real tenant.

The above writ will serve where there is a judgment against a real defendant, only insert the name.

Frequently the defendant, after entering into the common rule, wishes to withdraw his plea, and confess the action; in that case you must enter a *retraxit*, or a *relicta verificatione* on the roll. *Vide Retraxit.*

The tenants very frequently, to save the expence of sheriffs poundage and officer's fee, attorn tenants to the lessor of the plaintiff; in that case, make such attornment on a piece of paper, thus (naming the cause):

Attornment.

" Be it remembered, that we whose names are
 " hereunder written, being the several tenants in
 " possession of the premises belonging to J. G.
 " situate and being in the parish of, &c. do here-
 " by severally attorn tenants to A. B. of, &c.
 " gentleman (*the lessor of the plaintiff in the above*
 " *cause*), for such parts of the said premises as are
 " in our respective possessions; and we, each, and
 " every of us, have this day severally paid to the
 " said A. B. the sum of 1s. upon such attornment,
 " on account, and in part of the rent due, and to
 " become due from us severally and respectively,
 " for and in respect of the said premises; and we
 " do severally and respectively become tenants
 " thereof to the said A. B. from the 25th day of
 " March last past; as witness our hands, this
 day of 1783.

Writ of possession on two several demises.

Pay signing 81.
 per sheet for each
 mise after the
 first.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas *A. A.* lately in our court, before our justices at *Westminster*, by the consideration of the said court, recovered against *R. R.* late of, &c. his term yet to come of and in five messuages, and one acre of land, with the appurtenances, in the parish of *Saint Luke* in your county, which *J. H.* on the first day of *October*, in the twenty-third year of our reign, at the parish of *Saint Luke* aforesaid, demised to the said *A. To have and to hold*, the tenements aforesaid, with the appurtenances to the said

A.

A. and his assigns, from the day of then last past, to the full end and term of five years, then next following, and fully to be complete and ended; by virtue of which demise, the said *A.* entered into the said tenements with the appurtenances, and was possessed thereof; and the said *A.* being so possessed thereof, the said *R.* afterwards (*that is to say*) on the said first day of *October*, in the twenty-third year afore said, with force and arms (*that is to say*), with swords, staves, and knives, at the parish of Saint *Luke* afore said, in your county, entred into the said tenements, with the appurtenances, which the said *J. H.* demised to the said *A.* in manner afore said, for the term afore said, which is not yet expired, and ejected the said *A.* out of his said farm: *And whereas*, the said *A.* lately in our same court, before our justices at *Westminster*, by the consideration of the said court, recovered against *R.* his term yet to come of and in five other messuages, and one other acre of land, with the appurtenances, in the said parish of Saint *Luke*, in your county, which *J. M.* on the day of in the twenty-third year of our reign, at the parish of Saint *Luke* afore said, demised to the said *A.* *To have and to hold*, the said last mentioned tenements, with the appurtenances, to the said *A.* and his assigns, from the 30th day of *September* then last past, to the full end and term of six years, then next following, and fully to be complete and ended; by virtue of which last demise, the said *A.* entred into the said last mentioned tenements, with the appurtenances, and was possessed thereof; and the said *A.* being so possessed thereof, the said *R.* afterwards, to wit, on the said day of in the said twenty-third year, with force and arms (*that is to say*), with swords, staves, and knives, at the said parish of Saint *Luke*, in your county, entred into the said last mentioned tenements, with the appurtenances, which the said *J. M.* demised to the said *A.* in manner afore said, for the term afore said, which is not yet expired, and ejected the said *A.* out of his said farm last mentioned. Therefore

we command you, that without delay, you cause the said *A.* to have his possession of his said several terms yet to come, of and in the several tenements aforesaid, with the appurtenances; and that you certify to our justices at *Westminster*, on the morrow of the *Purification*, in what manner you shall have executed this our writ; and have you there this writ. Witness *Alexander Lord Loughborough*, &c.

Proceeding under 4 Geo. 2. c. 28. s. 2.

“ That in all cases between landlord and tenant, as often as it shall happen that one half year’s rent shall be in arrear, and the landlord or lessor hath a right by law to re-enter, for non payment thereof, landlord shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case no tenant be in actual possession, then to affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, &c. comprized in such declaration; and such affixing shall be deemed legal service, which shall stand in the name and place of a formal re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court, where the suit is depending by affidavit, or to be proved up in the trial, in case the defendant appears, “ *that half a year’s rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises; countervailing the arrear then due; and that the lessors or lessor in ejectment had power to re-enter*, then the lessor shall recover judgment, and have execution; which if the lessee suffer, without paying the arrears and costs, and without filing a bill in equity, to be relieved within six months, he shall be barred from all relief, other than by writ of error; and the lessor shall hold the premises discharged from the lease; but if the tenant or lessee tender to the lessor, or
bring

"bring into court the rent in arrear, together
 "with costs, all further proceedings shall cease:
 "and if the lessee be relieved in equity, he shall en-
 "joy the demised premises, according to his lease,
 "without obtaining a new one. *N. B.* This is
 "not to bar the right of a mortgagee, who may
 "pay the rent in arrear within six months, and
 "costs."

"If the lessee file a bill in equity for relief, he
 "must bring into court in forty days after the les-
 "sor's answer, so much as he shall swear to be
 "due, over and above the costs, there to remain
 "till hearing." *Ibid. sect. 3.*

Provided, if the tenant shall before the trial, pay
 or tender to the lessor, &c. or pay into court all the
 rent, with costs, further proceedings shall cease.
Sect. 4.

The true construction upon this act is, to take off
 the landlord, the inconvenience of his continuing
 always liable to an uncertainty of possession (*from
 its remaining in the power of the tenant to offer him a
 compensation at any time, in order to found an appli-
 cation for relief in equity*), and to limit and confine
 the tenant to six calendar months after execution
 granted, for his doing this; or else that the land-
 lord shall from thenceforth hold the demised pre-
 mises discharged from the lease. *1 Burr. 614.*

If the tenant is served with a declaration in eject-
 ment upon this act of parliament, he may apply by
 summons to stay proceedings upon payment of the
 rent and costs to be taxed; and if he tender the
 rent before ejectment delivered, court will stay pro-
 ceedings with costs. *2 Black. Rep. 746.*

Tenant may
 apply to pay
 rent, &c.

The ejectment is prepared as before (it is not
 necessary to seal a lease), laying your demise after
 the rent became due, which is generally *twenty days*
 after the quarter ended; after service thereof, the
 following affidavit is necessary, naming the cause:

Ejectment how
 to be prepared.

J. K. the lessor of the plaintiff in this cause, and
J. B. of, &c. Gentleman, severally make oath and
 say; and sith this deponent *J. B.* for himself saith,

Affidavit to move
 for judgment.

That on the day of last past, and for several days before, the messuage in the annexed declaration of ejectment mentioned, was shut up, and there being no tenant in the possession thereof, he this deponent did, on the day of last, affix a copy of the said declaration in ejectment, hereto annexed, and the notice thereunder written, upon the door of the said messuage, late in the tenure of the said *A. B.* And this deponent *J. K.* for himself saith, That before such declaration in ejectment was affixed as aforesaid, there was due to him as landlord of the said premises, from the said *A. B.* the tenant thereof, the sum of 14*l.* for half a year's rent, upon and by virtue of a certain indenture of lease made between this deponent of the one part, and the said *A. B.* of the other part; and that no sufficient distress was then to be found upon the premises, *countervailing the arrears of rent then due to this deponent*; And this deponent further saith, That he had, at the time of affixing of the said declaration in ejectment upon the door of the said messuage, power to enter on the same, for the non-payment of the rent so in arrear as aforesaid.

It appears in *Rep. & Cas. of Pract. C. B.* 68. That the affidavit required in this case is in substance as follows, "*That the declaration was fixed up-
" on such a place, being the most notorius part of the
" premises in question (there being no person in possession
" in whom the declaration could be legally served),
" that half a year's rent was then due from the late
" tenant; that no sufficient distress was to be found
" upon the premises, to answer the arrears then due;
" that the late tenant held such premises by virtue of a
" lease from the lessor of the plaintiff, and that therein
" is contained a clause of re entry for nonpayment of
" that rent."* *Pract. Reg. C. B.* 168.

How to move
for judgment.

You move upon this affidavit as before, for judgment against the casual ejector, pay serjeant's fees 10*s.* 6*d.*; and if no appearance and plea, sign judgment.

But

But if the tenant appears, and pleads upon the trial, all the matters in the above affidavit must be proved. 1 Burr. 614.

If tenant appears and pleads, what proof requisite.

“ If any tenant holding at a rack rent, or where rent reserved shall be three-fourths of the yearly value, who shall be in arrear for one year’s rent, shall desert the premises and leave the same, so as no sufficient distress can be had, two justices of the peace [*having no interest in the premises*], at the request of the landlord, may go and view the same, and affix on the most notorious part of the premises notice in writing, what day (*at the distance of fourteen days at least*) they will return to take a second view thereof; and if on such second view, the tenant, or some person on his behalf, shall not pay the rent in arrear, and there shall be no sufficient distress, the justices may put the landlord into possession, and the lease thereof to such tenant, as to any demise, shall be void.”

Method of getting possession, where tenant runs away a year’s rent in arrear, and leaves the premises untenanted.

Stat. 11 Geo. 2. c. 19.

The mortgagee, having a right of entry, and the premises tenanted, may serve an ejectment on the tenants as before; but if the premises are vacant, he must seal a lease thereon, in order to nominate a plaintiff, who is to be turned out by a defendant, as mentioned before; and the proceeding is exactly the same.

Of proceeding to recover premises by a mortgagee.

By Stat. 7 Geo. 2. c. 20. It is enacted, “ That where an ejectment is brought by a mortgagee to recover the possession of mortgage-premises, if the person who has a right to redeem, shall appear and pay to the mortgagee, or bring into court, the principal interest and costs, to be computed by the proper officer, he shall be discharged from the mortgage; and the court shall, by rule, compel the mortgagor to reconvey the premises, and to deliver up all deeds relating to the title of the same.”

If an ejectment is brought by a mortgagee, the mortgagor may appear, &c.

A judge’s order may be had for this purpose, Barnes 177.; and the prothonotary is to make all just deductions and allowances on paying off the mortgage. Barnes 176.

A judge’s order will do.

Where there are two or more mortgages, court will not compel a redemption of one only.

Final judgment after verdict for the plaintiff.

Hab. fac. possess.

Judgment in ejectment after defendant has withdrawn his plea and costs taxed, and also for the possession.

When there are two or more mortgages, the court will not stay proceedings, and compel a redemption of the first mortgage only, upon the payment of the principal interest and costs on that mortgage, without paying the rest. 2 *Black. Rep.* 726.

At which day cometh here as well the said *John Doe* as the said *A.* by their attorneys aforesaid; and upon this the premises being here seen, and fully understood by the justices here, it is considered, That the said *John Doe* recover against the said *A.* his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, and his damages aforesaid, ass. s'd by the said jury in form aforesaid, and also 13*l.* 19*s.* adjudged to the said *John*, by the court here, by his assent, by way of increase, which damages amount in the whole to 16*l.*; and that the said *A.* be taken, &c. And upon this the said *John Doe* prays the writ of our Lord the King, to be directed to the sheriff of the county aforesaid, to cause him to have his possession of his said term, yet to come, of and in the said tenements with the appurtenances; and it is granted to him returnable here, from the day of *Easter* in fifteen days, &c.

Enter on the roll as far as to the end of the issue, then say, At which day before our said justices at *Westminster* came the parties aforesaid by their attorneys aforesaid, and the sheriff did not send the said writ, nor did he do any thing thereupon; and hereupon the said *C. D.* by his said attorney, comes and relinquishes his averment by him in pleading above pretended, and says, That he cannot deny the said action of the said *John Doe*, nor but that he is guilty of the trespass and ejectment aforesaid, in manner and form as the said *John Doe* hath above thereof complained against him; and the said *John Doe* further saith, and acknowledges, That he hath sustained damages, by reason of the trespass and ejectment aforesaid, besides his costs and charges by him laid out about his suit in this behalf to 1*s.* and no more; and because the said *C. D.* doth not deny the same, but admits the allegation to be true, the said

John

John prays judgment, and his damages so acknowledged in form aforesaid, together with his costs and charges aforesaid, may be adjudged to him, &c. Therefore it is considered, That the said *John Doe* recover against the said *C. D.* his term aforesaid, yet to come of and in the tenements aforesaid, with the appurtenances, and the said 1s. damages in form aforesaid acknowledged, and also 7*l.* 10*s.* for his costs and charges by him laid out and expended about his suit in this behalf, adjudged to the said *John* by his consent, by the court here, which said damages, costs, and charges, in the whole, amount to 7*l.* 11*s.* and that the said *C.* be taken, &c. And the said *John* prayeth the writ of our said Lord the King, to cause him to have his possession of the term aforesaid, yet to come, of and in the tenements aforesaid, with the appurtenances, and it is granted to him returnable here, in fifteen days of *Easter*.

Judgment signed
day of
1783.

Proceedings in ejectment shall stay till the costs of a former ejectment be paid; although in such former ejectment, the lessor of the plaintiff never entered into the consent rule. 2 *Black. Rep.* 404.

Proceedings in ejectment stand the day before the trial (after a long delay), till costs of a former ejectment paid. *Ibid.* 1158. And the like, when brought by a fraudulent assignee (under the insolvent debtors act) of the former lessor of the plaintiff. *Ibid.* 1180.

How to recover the Mesne Profits, and from what Time.

IF judgment is obtained in ejectment, bring an action for the mesne profits; and as it is consequential to the recovery, it may be brought either in the name of the nominal plaintiff, or in the name of the lessor of the plaintiff, and in either shape, it is equally his action, against the tenant in possession, to recover the value of the profits, unjustly received by the tenant, in consequence of the ouster complained

plained of in the ejectment; for after a recovery in ejectment, the tenant is estopped from controverting the plaintiff's title, in a subsequent action for the mesne profits, provided the plaintiff only proceeds for mesne profits, from the time of the ouster complained of in ejectment; but if he proceed for *antedecendent profits*, he must prove his title to the premises, from whence they arose to shew his right to receive them. 2 Burr. 668.

Proof required
in such action.

In order to prove the plaintiff's title, it is only necessary to produce the copy of the judgment in ejectment, where the judgment is after verdict, together with the attorney's bill; but if by default, then a writ of possession executed is necessary; and a learned author says, That the latter does not seem requisite; for if the tenant be concluded by the judgment in ejectment, from controverting the plaintiff's title, he is consequently concluded from controverting his possession, because his possession is part of his title. As to the value of the mesne profits, they must be proved; but in estimating that value, the jury are not confined to the mere rent of the premises, for they may give whatever damages they think proper, though the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years. 3 Wils. 121. 2 Burr. 267. Bull ni. pri. 88.

Jury are not
confined to mere
rent.

If brought by
nominal plain-
tiff, court will
stay the proceed-
ings till security.
Tenants in com-
mon may have
this action.

And in case an action is brought by the *nominal plaintiff*, the court, on application, will stay the proceedings thereon, till security is given for costs. *Ibid.*

If one tenant in common recovers in ejectment against another, he may have an action for the mesne profits. 3 Wils. 118.

Cannot pay mo-
ney into court.

The defendant cannot pay money into court in an action for mesne profits. 2 Wils. 115.

Action for the
mesne profits,
pending a writ
of error.

In an action for the mesne profits, brought pending a writ of error on the ejectment, plaintiff may proceed to ascertain his damages, and to sign his judgment; but *Cur.* will stay execution thereon, till the writ of error on the judgment be determined. *Rep. & Caf. Pract. C. P.* 40.

On motion in the treasury, that defendant might be held to bail upon affidavit in an action for mesne profits, the judges ordered defendant *Metteram* to be held to bail for 500*l.* but would not order the other defendants to be held to bail, they being only his under-tenants. *Pract. Reg. C. P.* 62.

Defendant held to bail for the mesne profits.

In *ejectment*, a writ of *habeas corpus* is the proper process to remove the plaintiff (under which the defendant must appear in this court, and enter into the common rule, and plaintiff must declare *de novo*), and not a writ of *certiorari*, as in replevin, whereby, after the record removed, the parties are to proceed upon it, and not to begin *de novo*. *Burnes* 441. *Higmore v. Barlow*.

How to remove an ejectment from the Mayor's court, London.

Bankrupts.

IF any bankrupt, who shall have obtained his or her certificate from the acting commissioners, and such certificate shall have been allowed and confirmed, as by this act is directed, shall be taken in execution, or detained in prison, on account of any debts due or owing before he or she became bankrupt, by reason that judgment was obtained before such certificate was allowed and confirmed, it shall and may be lawful for any one or more of the judges of the court wherein judgment has been so obtained against such bankrupt, on such bankrupt's producing his or her certificate, allowed and confirmed, to order any sheriff or sheriffs, bailiff or officer, gaoler, or keeper of any prison, who hath or shall have any such bankrupt in his custody, by virtue of any such execution, to discharge such bankrupt out of custody on such execution, without payment of any fee or reward; and such sheriff, &c. is and are hereby required to discharge such bankrupt out of his custody accordingly, and is indemnified from any action for an escape for so doing. 5 *Geo. 2. c. 30. s. 13.*

Bankrupts imprisoned after certificate allowed, how to be discharged.

If

How to discharge a bankrupt. If the bankrupt is in custody before his certificate is signed, and afterwards it is allowed, apply to a judge, at his chambers, for a summons to shew cause *why he should not be discharged, he having obtained his certificate*; which upon producing, and an affidavit (if the attorney does not attend for the plaintiff) of the debt having accrued before he became a bankrupt, the judge will grant an order upon the *third* summons.

If commission appears fraudulent, court will not discharge. The court will not discharge a bankrupt on a common appearance, when the commission appears to have been grossly fraudulent, *viz.* the defendant lived in *Russel-street, Bloomsbury*, and the commission described him as of the parish of *Saint Faith the Virgin, in London.* 2 *Black. Rep.* 725.

Bail; if the bankrupt has his certificate allowed, may apply to be exonerated by summons, without rendering the principal, before return of second *sci. fa.* *Barnes* 104.

Cannot be discharged from an extent. But if the bankrupt be in custody at the suit of the king, on an *extent*, he cannot be discharged therefrom. 1 *Atk.* 220.

A bankrupt in custody, on an attachment for the non-performance of an award, discharged, on having his certificate. A bankrupt was taken upon an attachment for not performing an award; after which he became bankrupt, and obtained his certificate; and upon motion for his discharge he was opposed, because the bankruptcy does not purge a contempt; but the court held, that this was a demand for which an action of debt will lie; and the act says, he shall not be arrested, &c. for any debt due before the bankruptcy. It would be hard to keep him in custody when the duty was discharged; and therefore he was discharged. 2 *Str.* 1152.

A bankrupt discharged from a judgment given after his bankruptcy, for a debt due before. On motion to discharge a bankrupt out of execution, on the *Stat.* 5 *Geo.* 2. c. 30. it appeared, that the debt was contracted before the bankruptcy, and sued for and recovered pending the commission, and before any certificate obtained; and the judgment was afterwards affirmed on error, and costs given on such affirmance. The court discharged him as to all; for not having his certificate, he could

could not plead to the action ; and these costs were attendant on the original judgment, and cannot be considered as given for delay of execution, when it appears there ought to have been no execution, though no writ of error had been brought. 2 Str. 1196.

Notwithstanding a bankrupt cannot be discharged out of custody upon an arrest, before his certificate is allowed, yet if the creditor prove his debt under the commission, the defendant may, by petition, apply to the court of Chancery, for him to elect, whether he will proceed at law, or take his debt under the commission ; and though he does make his election, yet he may assent to, or dissent from the certificate. 1 Atkins 220.

If bankrupt in custody at the suit of a creditor, who has proved his debt, he may petition for plaintiff to elect.

In Chancery. In the matter of *A. B.* a bankrupt.

To the Right Honourable the Lord High Chancellor of Great Britain,

The Humble Petition of the said Bankrupt,

Sheweth,

That a commission of bankrupt, on the day of *Petition for* of 1782, was issued under the great seal of Great Britain, against your petitioner, directed to *W. B. H. H. H. R. H. C.* Esquires, and *R. H.* Gentleman,

That *J. C.* of in the county of weaver, a creditor of your petitioner, did prove, at one of the meetings under the said commission, a debt due to him from your petitioner, to the amount of 150*l.*

That the said *J. C.* lately issued out of his Majesty's court of *Common Pleas*, against your petitioner, a writ of *capias ad respondendum*, returnable on the morrow of *All Souls*, and caused your petitioner to be arrested for the said sum of 150*l.* so proved under the said commission.

" Your petitioner, therefore, most humbly

" prays your Lordship, to order the said

" *J. C.* forthwith to make his election either

“ther solely to proceed at law against your
 “petitioner, or take his said debt under the
 “said commission: And that in case he
 “should elect to take the said debt under
 “the said commission; that then your
 “Lordship will be pleased to order the said
 “J. C. to release your petitioner from the
 “said action, at his own costs and charges;
 “or that your Lordship would be pleased
 “to grant your petitioner such other relief
 “in the premises as to your Lordship may
 “seem meet.

“*And your petitioner shall ever pray, &c.*”

How to proceed
 upon this petition.

This petition is to be ingrossed on a treble fix-penny stamp paper, and left at the bankrupts office, *Clement's Inn*, with a fair copy for the chancellor, upon plain paper. When he has answered it, serve copy on the plaintiff's attorney (and his client, I think, would be best); make affidavit thereof, and also let the defendant make affidavit that the plaintiff has proved the debt under the commission, and that he does not stand indebted to him in any other sum. Upon the hearing of the petition, get solicitor under the commission to attend with the proceedings; pay him 20s.

Having now shewn how the bankrupt may be released, it may be necessary to state the relief of his bail, in case they have not surrendered him prior to the gaining his certificate; and what will not discharge him from other debts, by reason of his certificate.

When bail are
 fixed.

If the certificate is obtained *before the bail are fixed*, they shall be *discharged*; but if they are *fixed before the certificate is obtained*, they remain liable.
 2 *Black. Rep.* 811.

Certificate will
 not discharge the
 bankrupt upon
 an action on bail-
 bond.

But if an action is brought upon a bail-bond against the bankrupt himself, though he is discharged from the original debt by his certificate, yet he is not from this; for the court said, that this was a new debt, and distinct cause of action, and therefore

therefore refused to relieve the bankrupt, and ordered the sheriff to pay the money to the plaintiff. *Cockerill v. Owston. 1 Burr. 436.*

But court said, the certificate shall discharge proceedings depending against bail, in an action upon the old debt, who are not already fixed. *Ibid.*

A. becomes bail for *B.* on a promise of indemnity. The bail-bond is assigned, and judgment had in an action thereon, against *A.* who brings error in the Exchequer. *B.* becomes a bankrupt. Judgment against *A.* in the Exchequer, who brings error in parliament, which is nonprossed, and then he pays debt and costs. The damnification does not accrue till that payment, and is not covered by the commission and certificate; but an action lies for *A.* against *B.* the bankrupt, on his promise of indemnity. *2 Black. Rep. 794.*

An uncertificated bankrupt going beyond sea, and refusing to assist his assignees in getting in his debts, is guilty of *nonconformity*, and cannot be discharged under the *insolvent debtors act. Ibid. 1188.*

A creditor who obtains a verdict before the commission, is intitled to prove his costs as well as his debt, though judgment not signed till after the commission issued. And having proved his debt, and otherwise acted under the commission, has made his election, and shall not afterwards resort to the bankrupt's bail. *Ibid. 1317.*

Debt was brought on bond payable by instalments, some of which were not payable till after the bankruptcy. Question, Whether this be a debt discharged by the certificate, or not? After the first default of payment, the bond is forfeited, and the penalty is the debt in law. The court will not enter nicely into the matter of bail or no bail. *Rule for common appearance. Barnes 101.* Vide my *Instruct. Cler. in B. R. p. 424.*

The defendant, 9th May 1734, was bail in error; 25th October following he committed an act of bankruptcy, and after got his certificate. On 17th

Debt and costs paid for a bankrupt on a promise of indemnity is not covered by the commission, same not being paid till after the bankruptcy.

Bankrupt going beyond sea, refusing to assist his creditors to get in his debts, not intitled to be discharged under the Insolvent Act.

Creditor is intitled to prove his costs after verdict under commission, though judgment not signed till after the commission issued.

Defendant producing his certificate, debt argued on a common appearance, the bond being forfeited before commission issued.

Where there is an act of bankruptcy between becoming bail in

error and affirmation, no discharge.

November judgment affirmed; and to an action on the recognizance he pleaded his certificate. And it was held he was not discharged; for it was a contingent debt, for which the plaintiff could not come in under the commission, the *Stat. 7 Geo. 1. c. 51.* only letting in those where the payment was certain, though future. 2 *Str.* 1043.

No debt can be barred but what was a debt contracted with certainty before the act of bankruptcy. 3 *Wils.* 17.

Annuity bond.

An annuity bond, if forfeited before the bankruptcy, should be valued and proved under the commission. If not forfeited till after, it cannot be proved; and the obligor may be taken in execution on a judgment thereon. Bond given, 18th *January* 1770; 18th *March* 1775, commission issued; 15th *July* 1775, the certificate was allowed; a quarter became due the 18th of *April* 1775; the annuity was regularly paid to the 18th of *January* 1775; so that the bond, in fact, was never forfeited. 2 *Black. Rep.* 1106.

A bill of exchange drawn on and accepted by *A.* but not due, nor paid, till after the drawer was declared a bankrupt, the defendant not discharged by the commission of bankruptcy. *Ibid.* 839.

Proceedings against Prisoners.

IF any person is in custody of the warden, or keeper of any other prison, it will behove the practitioner to take care, and observe the rules laid down, in the strictest manner, in proceeding against him; otherwise the least lach in the world will deprive his client of the custody of the prisoner, as the law pays the highest regard to the liberty of the subject, and most likely may be of disagreeable consequence to himself, since the courts have determined, that an attorney is liable to make satisfaction to his client for neglecting to charge a prisoner in
execu-

execution, though it appeared rather for want of judgment, than negligence. 2 Wils. 325.

Formerly if any prisoner was in the custody of the Warden of the Fleet, the plaintiff, at whose suit the prisoner stood charged, was obliged to bring such prisoner to the bar of the court by *habeas corpus*, to declare against him, within certain times appointed by the court, mentioned in the rule of Hl. 14 & 15 Car. 2. and if in the custody of any sheriff, the plaintiff was obliged, before he could declare against any such prisoner, to issue a *habeas corpus*, to command the gaoler to bring the defendant into court, in order to commit him to the custody of the Warden of the Fleet; but this being attended with great expence, as well as inconvenience to the plaintiff, the legislature thought proper to interfere, and therefore, by Stat 4 & 5 W. & M. c. 21.

How prisoners were proceeded against formerly.

f. 2. It is enacted, "That if any defendant or defendants be taken or charged in custody, at the suit of any person or persons, upon any writ or writs, out of any of the courts at Westminster, and imprisoned or detained in prison, for want of sureties for their appearance to the same, the plaintiff or plaintiffs in such writ or writs, may, before the end of the next term after such writ or process shall be returnable, declare against such prisoner or prisoners in the court where such writ or writs shall issue, whereupon the said prisoner or prisoners shall be taken and imprisoned, or charged in custody, and may cause a true copy thereof to be delivered to such prisoner or prisoners, or to the gaoler or keeper of the prison, or gaoler in whose custody such prisoner shall be or remain; to which declaration or declarations, the said prisoner or prisoners shall appear and plead; and if such prisoner or prisoners shall not appear and plead to the same, the plaintiff or plaintiffs in such case shall have judgment, in such manner as if the prisoner had appeared in the said court, and refused to answer or plead to such declaration."

The present mode for delivering declarations against prisoners.

"That it shall and may be lawful for any person who shall have cause of action against any prisoner

Copy of declaration delivered to prisoners, &c.

and affidavit
made thereof,
plaintiff to sign
judgment.

“soner of the *Fleet*; after filing or entering a declaration, to deliver a copy to such defendant in any personal action, or to the turnkey or porter of the *Fleet* prison, and after a rule given to plead, to be out in eight days at most, after delivery of such copy of the declaration, and affidavit made of such delivery, to sign judgment against such defendant, as if he had been charged at the bar of the Common Pleas.” 8 & 9 W. 3. c. 20. s. 13.

Upon this act of parliament being made, the court thought proper to make the following rule respecting the declaration :

No declaration
to be delivered
before return of

“That no copy of any declaration be delivered to any prisoner in custody, before the day of the return of the process upon which the defendant was taken or charged in custody.” *Eas. 5 W. & M.*

No rule to appear, &c. till
after affidavit
filed.

“That no rule be given for the defendant in custody, to appear and plead to any declaration against him, until an affidavit be filed, with the proper secondary, of the delivery of the copy of such declaration, and of the time when, and the person to whom the same copy was delivered, and a copy of the said affidavit shall be produced * to the prothonotary before judgment signed, together with a certificate from the proper officer, that no appearance is entered with him.

* Now dispensed
with.

If declaration be
not entered in
the office, &c.

“If declaration be not entered or left in the office, before the end of the next term after the writ or process (by which the prisoner shall be taken or charged in custody) be returnable, and affidavit made and filed in manner aforesaid, before the end of twenty days next after such term (Easter term excepted), and within ten days after Easter term, the prisoner shall be discharged upon the entering of his appearance, with the proper officer, by writ of *superfedeas* made by him according to the ancient practice of this court.”

Gaoler not delivering
declaration
till,

If any gaoler or keeper of a prison having received a copy of a declaration against any prisoner in his custody,

custody, shall suppress the same, and not deliver it forthwith to such prisoner, an attachment shall be issued against him. *Ibid.*

If any defendant hath or shall render him or herself, or be rendered to the Fleet prison in discharge of his or her bail, at the suit of any plaintiff, where no further proceedings by declaration have been had against such defendant so rendered, before such render, unless the plaintiff shall declare against such defendant within two terms after such render; such defendant may be discharged out of custody, by *superfedeas*, to be allowed by one of the justices of this court, if cause be not shewn to the contrary by the plaintiff or his attorney, upon notice to either of them given by the defendant's attorney or agent, and affidavit made of such notice. *R. E. 8 Geo. 1.*

Defendant surrendering in discharge of his bail before declaration delivered, to be declared against within two terms.

Plaintiff is not obliged to charge a prisoner in execution the second term after judgment, if he brings a writ of error, *2 Wils. 380.* nor while a treaty subsists between the parties. *3 Wils. 455.*

But where a declaration has been delivered, or judgment had against such defendant so rendering himself, or being rendered, before such render, unless the plaintiff shall proceed to judgment upon such declaration delivered, within *three terms after such render* (the defendant having appeared), and charge such defendant in execution within *two terms after such judgment obtained*, the defendant may be discharged, in like manner by *superfedeas*, unless cause shewn upon the like notice and affidavit. *Same rule.*

If declaration delivered, or judgment had before render, plaintiff to proceed to judgment in three terms after, and charge defendant in execution within two terms after judgment.

The term in which the writ is returnable to be accounted one of the two terms.

The declaration must be served on a prisoner, or left with the turnkey, though before surrender he appeared by attorney. *2 Black. Rep. 786.*

How to declare if the Defendant is already in the Custody of the Warden of the Fleet.

MAKE two copies of the declaration on treble penny stamp paper, take same to the prothonotaries

office, pay for the entry 2s. a count, the clerk will mark both copies; then deliver one of them to the turnkey, and at the same time ask him if the defendant is his prisoner; if he acknowledges the defendant in custody, make an affidavit of the service, and swear it before a judge, annexing the other copy of the declaration thereto.

The form of the declaration.

London, to wit, Richard Fenn, late of London, merchant, was attached to answer John Denn in a plea of trespass on the case, and whereupon the said John Denn, by S. U. his attorney, complains, For that whereas (as in other cases).

When the affidavit is sworn, take it to the secondaries office, and the secondary will give a rule thereon for the defendant to appear and plead, pay 3s. 10d.

In the Common Pleas,

John Denn, Plaintiff,

and

Richard Fenn, Defendant.

The affidavit.

A. B. of, &c. Gentleman, maketh oath and saith, That he did, on the day of last past, deliver unto G. B. one of the turnkeys of the Fleet Prison, a true copy of the declaration hereunto annexed; and the said turnkey then acknowledged to this deponent, that the said defendant was at that time a prisoner in the said prison of the Fleet.

If the defendant does not plead (*no demand is necessary*) within the time, sign judgment, and give notice of enquiry to the prisoner or turnkey, and proceed against him as in other cases (*excepting that he must be proceeded against to final judgment within three terms*). See after the rule. *E. 8 Geo. 1.*

Rule to plead may be given after the first rule.

But if you forget to sign your judgment on the first rule given to plead, you may in the next term give a fresh rule (*no demand is necessary*), and for want thereof sign judgment, when the rule expires.

Must be charged in execution within two terms.

After you have obtained final judgment, the prisoner must be charged in execution, within two terms

terms next after such judgment had and obtained, "the term in which judgment is signed to be accounted one of the two terms." R. E. 8 Geo. 1. Except defendant brings a writ of error, 2 Wils 380; or while a treaty subsists between the parties, 3 Wils. 55.

How to charge a Prisoner in execution in the Fleet.

MAKE out *habeas corpus ad satisfaciendum* upon a 5s. stamp parchment, pay signing by the prothonotaries 1s. 4d. seal 7d. judge's *allocatur* 4s. (which must be obtained before it is sealed); take it to the clerk of the papers at the Fleet, four days before return, pay 9s. 2d. it must be made returnable on a day certain, and the roll must be complete and filed; if not, Mr. Underwood takes it to Westminster for you; if filed, go to the clerk of the treasury, Mr. Stubbs, pay 2s. and desire it may be brought to the secondary; which being done, pay the warden's man 10s. 6d. for bringing up defendant, clerk 1s. secondary 10s. viz. 4s. to prothonotary, and 6s. for himself.

If he is returned with more causes than one, pay secondary 3s. each cause, 2s. to prothonotary, and 1s. for himself.

A *habeas corpus ad satisfaciendum* may issue to the warden of the Fleet, or the keeper of any inferior prison of a liberty or franchise, returnable in court at a day certain, and the number roll of the judgment to be indorsed upon the writ by the attorney, who sues it out; and such writ shall be a good cause of detainer. R. Mich. 1654.

Hab. corp. to issue, and number roll indorsed thereon.

If a defendant be brought into court upon a *habeas corpus ad satisfaciendum*, he is to be charged in execution upon that judgment only, on which the *hab. corp.* issued; and if there be several judgments on which he is to be charged, a *hab. corp. ad satisf.* must be on each.

On several judgments, separate Hab. corps

How to charge a Prisoner in the Fleet by Way of new Detainer.

To detain a person in the Fleet, and hold him to bail, affidavit must be made that the debt is 10*l.* or above, and the same indorsed by the prothonotary on the copy of the declaration.

N. B. This affidavit must be before a Justice if made

The plaintiff whole in prisoner arrested, must make such affidavit.

N. B. Decrees are made by the court and entered

If defendant is in custody on a King's Bench process, he cannot be committed to the Fleet before a declaration, how to proceed.

No copy of a declaration delivered at the Fleet prison against any prisoner there, shall be a sufficient charge to hold such prisoner to bail, or to retain such prisoner in custody for want of bail, unless an affidavit that the plaintiff's cause of action amounts to ten pounds or upwards, be first made and filed in the proper prothonotaries office, and an indorsement made by the said prothonotary or his deputy, upon such copy of the declaration, signifying the sum of money specified; for which sum so indorsed, bail shall be required, and for no more. *R. Hil. 8 Geo. 2.*

Two copies of declaration are prepared as before, and an affidavit must be made of the delivery of such copy, and filed within twenty days as before.

But if the defendant is arrested by process issuing out of the court of King's Bench, and in custody for want of bail, removes himself by *habeas corpus* to the Fleet prison, and the plaintiff charges him in the Fleet with a copy of the declaration, he is not obliged to make and annex an affidavit of the debt as by rule, *R. 8 Geo. 2.* is directed, in regard there was an affidavit of the debt when the plaintiff took out the process upon which the defendant was arrested; but if the declaration comes in as a new charge against a prisoner in custody at the suit of another plaintiff, there the above rule must be observed. *Barnes 71.*

If a defendant in custody on a King's Bench process be committed by this court, or a judge of this court, to the prison of the Fleet, before a declaration delivered, the plaintiff cannot declare against him in the King's Bench, without removing him to the prison of that court by *habeas corpus ad respondendum*; but he may declare against him in this court; and for default of declaring in due time, this court may

may discharge the defendant out of custody. After a declaration delivered, the action must be carried on in that court in which the plaintiff declared, though the defendant be removed to the prison of another court, and the *superfedeas* for default of subsequent proceedings, must issue out of that court in which the plaintiff declared.

The prothonotaries mark the declarations, and an affidavit must be made as before.

Where a defendant was served with copy of process, but before declaration delivered, became a prisoner in the *Fleet*, and the plaintiff entered an appearance for him, pursuant to the statute, and left a declaration in the office, and gave him notice of it, the court set aside the proceedings, and held, that the declaration ought to have been delivered at the *Fleet*.

A prisoner in custody on an attachment for a contempt of the court, cannot be charged with the declaration without leave of the court; and the charging a defendant with a *ca. sa.* whilst he was in custody of the sheriff of *Middlesex* on an attachment for a contempt of this court, has been held irregular; therefore a judge's order is necessary.

If prisoner be taken upon an escape warrant, and is in custody of the warden or other gaoler, he must be declared against, before the end of the second term after his being so taken, otherwise he may be discharged.

A fugitive surrendering himself to the *Fleet* under the insolvent act, is not a prisoner in custody of the warden, nor liable to be charged with a declaration. The prisoners who are liable to be charged must be such as are prisoners upon mesne process of execution in a civil suit. A fugitive is a mere volunteer; he may come and go when he pleases; but by going he forfeits the benefit of the act. 2 *Black. Rep.* 972.

*How to proceed if the Defendant be in Custody
in Newgate, Ludgate, or any other County
Gaol.*

IF the defendant be in custody of any sheriff, &c. at your suit, then make two copies of the declaration on treble penny stamp paper, one to deliver to the gaoler, turnkey, or prisoner, and the other to annex to an affidavit of the delivery, to be filed with the secondary of the prothonotaries office, which must be filed before the end of *twenty days after the second term (except after Easter term, and then in ten days)* for no rule to plead can be given till affidavit is made; take them to the prothonotaries office (pay for the entry 2s. a count), who will mark them; then leave one with the gaoler or turnkey of the prison, at the same time asking him, if the defendant be a prisoner at the suit of the plaintiff?

Affidavit of delivery.

R. G. of, &c. maketh oath, That he did, on the 13th day of *June* last, deliver a true copy of the declaration hereunto annexed unto *Mr. W.* the gaoler (or *Mr. J. B.* the turnkey) of the gaol or prison of the county of *O.* And the said gaoler (or turnkey) then owned the said defendant above-named, to be a prisoner in the said prison; and this deponent further saith, That the said defendant was arrested at the suit of the plaintiff, by process issued out of this court, before the delivery of the said declaration.

N. B. The latter part of this affidavit by the rule of *E. 5 W. & M.* does not seem to be necessary.

Upon filing your affidavit of the delivery with the secondary, he gives a rule to appear and plead; and if no appearance and plea, the prothonotaries clerk will sign your judgment (having filed warrants of attorney), without having a copy of the affidavit of the delivery, or producing a certificate of appearance not entered, that now being dispensed with. And *N. B.* no demand of plea is necessary against a prisoner.

But

But if the defendant be not in custody of the sheriff, &c. at your suit, then, in order to detain him, you must make affidavit of the debt, and sue out a *capias* for that purpose, and send to the sheriff, who will make out his warrant thereon to the gaoler to detain him; and proceed afterwards as before.

If defendant in custody not at your suit, how to proceed.

If a prisoner in the *Fleet* be charged with a declaration in this court, and he afterwards removes himself to the *King's Bench* by *hæ. corp.* the plaintiff may proceed to judgment against him in this court; and in order to charge him in execution, must bring a *hæ. corp. ad satisfaciendum*, directed to the marshal, to bring him before this court.

If prisoner remove to the King's Bench from Fleet after declaration, how to proceed.

Having now shewn how a prisoner is to be declared against and detained anew, it will now be requisite to shew, *when they are to appear and plead*, if they mean to make a defence, which is too often the case to create expence.

When to appear and plead.

Within what Time Prisoners are to appear and plead.

If a copy of the declaration be delivered before *terminum Paschæ*, or *crastinum animarum*, and affidavit thereof made and filed; and the defendant doth not enter his appearance with the proper officer, within ten days after *Easter* or *Michaelmas Term* respectively, judgment may be entred against him, if rules have been given; but if he doth enter his appearance as aforesaid, before the end of ten days after the term, he shall implead unto the next term, unless the action be in *London* or *Middlesex*, and the defendant be in prison within forty miles of the city of *London* and *Westminster*; then, though he doth appear before the expiration of ten days after the end of the term, *he shall plead two days before the assign day of the next term*, and in default thereof, rules having been given, judgment may be entred against him as aforesaid. *Rule E. 5 W. & M.*

Declaration delivered before terminum Paschæ or crastinum animarum, and defendant does not appear, judgment, &c.

Declaration delivered on or after *metem Pasche*, &c., when to appear and plead.

If a copy of the declaration be delivered on or after *mensum Pasche* in *Easter* term, or *crastinum animarum* in *Michaelmas* term, or in *Hilary* or *Trinity* terms, and the plaintiff shall thereupon give rules to appear and plead, if the defendant enter his appearance two days preceding the effoign day of the next term, he shall impear until the said next term; but if he doth not appear within that time, judgment may be entred against him as aforesaid.

Writ returnable one term, declaration delivered before effoign of next, may give rules to appear and plead; if no plea, sign judgment.

If the writ be returnable in one term, and a copy of the declaration be delivered before the effoign day of the next term, the plaintiff in such next term may give rules to appear and plead; and if the defendant doth not enter his appearance, and plead by the time that the rules are out, judgment may be entred against him as aforesaid. *Ibid.*

May any time before final judgment, put in bail.

A prisoner may any time pending the action, and before final judgment, file special bail, and justify the same; and in that case he may be discharged as to that action by *superseas.*

Prisoner pleads in person not to pay for the issue alter by attorney.

If a prisoner plead in person, he does not pay for the issue, otherwise by attorney; nor must you deliver the issue to the attorney if he plead in person. 2 *Wils.* 11.

The plaintiff must proceed to trial and judgment *within three terms after declaration delivered, or after render*, if declaration was delivered before; and to execution within two terms after judgment, including the term in which judgment shall be signed, or the defendant may be discharged. *R. E. 8 Geo. 1, Vide rule at length after.*

When Prisoners are intitled to their Discharge.

Where upon a commitment of a prisoner, he may be discharged by *superseas*, &c.

IF the defendant be committed to prison by process out of this court, or *habeas corpus*, the prisoner entering his appearance with the prothonotary in case of a plaint, or in case of an attachment of privilege; or with the *filicer* in case of other process, and giving rules to declare, the plaintiff not de-

declaring before the end of the next term after the commitment, the defendant in reference thereunto to be discharged of his imprisonment by *superjedaas*, in the end of the next term, and liberty for the plaintiff to declare upon that appearance the next term after that, at the farthest. *R. M. 1654 f. 15.*

If the declaration be not entered or left in the office before the end of the next term, after the writ or process (by which the prisoner shall be taken or charged in custody) be returnable, and an affidavit made and filed with the proper secondary, of the delivery of the copy of such declaration, and of the time when, and the person to whom, the same copy was delivered, before the end of twenty days after such term (Easter term excepted, and within ten days after Easter term), the prisoner shall be discharged upon his entering of his appearance with the proper officer, by writ of *superjedaas* made by him, according to the ancient practice of this court. *R. E. 5 H. & M. f. 6.*

N. B. The term in which the writ is returnable, is accounted as one of the terms.

Captas was taken out the 10th of May, 1778, in Easter term, returnable on the morrow of the Holy Trinity, and the defendant was arrested the 28th of May, five days before the end of Easter term, the plaintiff did not declare in Trinity term, upon which a *superjedaas* was moved for in the treasury chamber; the judges were of opinion, that the defendant was not impericeable till the end of the term after that in which the process is returnable (not after that in which the arrest is made). 2 Black. Rep. 1242.

Get the clerk of the papers to give you a copy of the causes, pay 3s. 6d; take out a summons from a judge to shew cause, "why he should not be discharged upon entering a common appearance for want of declaring." Serve a copy thereof on the plaintiff's attorney; if he does not attend, take out a second and third, then make affidavit of such service on a treble 6d. stamp paper, and swear the same before a judge; at the same time prepare and ingross your

Declaration to be entered before the end of the second term, or else a *superjedaas*.

A defendant is not impericeable for want of declaration, till the end of the term after that in which the process is returnable (not that in which he is arrested).

How to discharge out of the Fleet, for want of declaring.

super-

superfedeas for the judge's *fiat*; then, upon receipt of the judge's order, enter an appearance with the prothonotaries, pay 3s. 10d.; no *præcipe* requisite; signing *superfedeas* with prothonotaries, 1s. 4d.; seal 7d.; leave it with the warden of the *Fleet*.

N. B. After declaration, in all writs in this court, the prothonotaries sign the *superfedeas*, and appearances are therein entered.

By a new rule E. 23 Geo. 3. Attendance upon a summons now is but one half hour, formerly an hour.

How to *superfedeas* in the custody of the sheriff for want of declaration.

If the defendant be in a county gaol, get a certificate from the gaoler of the causes, and an affidavit of his having signed the same; then proceed by summons as before. The first order if not consented to will be *nisi*, within *six days*, and afterwards an absolute one, pay summons 2s.; order *nisi*, 2s.; order absolute, 6s. *fiat*, 4s.

When intitled for Want of proceeding to Trial, or Judgment and Execution.

Prisoner to be defended if the plaintiff proceed not in three terms after declaration delivered.

Or after judgment, and not charging in execution in two terms, unless waived.

IF any plaintiff shall declare against any defendant in custody of the warden of the *Fleet* prison, or of any sheriff or other officer, by virtue of any process of this court; and shall not further proceed to judgment within three terms after such declaration delivered, *inclusive of the term in which the declaration shall be delivered*, the defendant having appeared; or if any plaintiff having obtained judgment in this court, in any action against any defendant, a prisoner as aforesaid, and shall not charge such defendant so remaining a prisoner in execution upon the judgment so obtained, *within two terms next after such judgment*, so had and obtained, *including the term in which the said judgment shall be signed*; or within two terms now next ensuing upon judgment already had; then such defendant to remaining in prison, may be discharged out of custody where he shall be detained, by *superfedeas*, to be allowed

allowed by one of the justices of this court, if cause shall not be shewn by the plaintiff or his attorney, why such plaintiff had not proceeded before that time to judgment and execution, as aforesaid, upon notice to either of them given. *R. E. 8 Geo. 1.*

If a prisoner is discharged, or ordered to be discharged, by this court, or any of the justices thereof, by *superfedeas*, for want of prosecution, and such prisoner be afterwards arrested, or detained in custody by action of debt, brought upon judgment obtained in the cause wherein such prisoner was discharged, or ordered to be discharged, a common appearance shall be accepted. *R. II. 8 Geo. 2. Reg. 2.*

Cannot arrest on judgment after a discharge.

And if any defendant hath, or shall, render him or herself, or be rendered to the Fleet prison, in discharge of his bail, at the suit of any plaintiff, where no further proceedings by declaration have been had against such defendant so rendered, before such render, unless the plaintiff *shall declare again?* *such defendant within two terms after such render;* and where any declaration hath been delivered against such person so rendering him or herself, or being rendered, or judgment has been had against him or her before such render, unless the plaintiff shall proceed to judgment upon such declaration delivered *within three terms after such render (the defendant having appeared)* and charge such defendant in execution *within two terms after such judgment obtained*, such defendant may be discharged out of custody, by *superfedeas*, to be allowed by one of the justices of this court, if cause shall not be shewn to the contrary, as aforesaid, by the plaintiff, or his attorney or agent, and oath made of such notice given. *R. E. 8 Geo. 1.*

If plaintiff does not declare, where defendant renders himself in discharge of his bail in two terms.

Or not proceed to judgment in three terms. And charge in execution within two terms after judgment, prisoner may be discharged on notice.

N. B. So for want of getting a demurrer argued within the third term. *Barnes 383.*

The plaintiff shall have every day in the second term to charge in execution. *2 Wills. 380.*

If the declaration is delivered in *Hilary* term *Rule explained.* 1783, the plaintiff must sign final judgment the last day

day of *Trinity* term, and charge the defendant in execution the last day of *Michaelmas* term.

If a writ be against husband and wife, and wife be in custody, she shall not put in bail for her husband.

If a writ be sued out against husband and wife, and the wife only be arrested and detained in custody, she shall not be compelled to put in bail for her husband, but may file common bail for herself, and have a *superfedeas* for her discharge; but if the husband only be arrested, he shall put in bail for his wife as well as himself.

If plaintiff become bankrupts, and the assignees make due diligence to charge defendant in execution, yet if defendant prevents it by plea, he shall not be superseued.

Plaintiffs proceeded to final judgment in *Michaelmas* term 1767; the plaintiffs became bankrupts between that and *Hilary* term, and the assignees sued a *scire facias* for execution upon the judgment, returnable the first of *Hilary* 1768. The defendant pleaded a plea, which was held bad upon demurrer, in the same term, and therefore the defendant prevented himself from being charged in execution in *Hilary* term, which might have been done, if he had not pleaded. Now, upon motion for a *superfedeas*, the court held, that the bankrupts could not charge the defendant in execution in *Hilary* term, because the assignees were intitled to the benefit of the judgment, therefore the rule for the *superfedeas* was discharged, the assignees having made due diligence. 2 *Wils.* 378.

Delay by error.

If defendant delays the plaintiff from proceeding by a writ of error, he must charge him in execution two terms after affirmance, including the term in which the judgment is given. 2 *Wils.* 280.

If render in *Easter* term, and declaration filed of *Hilary*, when to sign final judgment.

If he renders in *Easter* term, and declaration is filed of *Hilary* (although the plaintiff has tried his cause), yet he is not bound to sign final judgment till the last day of *Trinity* term, nor to charge him in execution till the last day of *Michaelmas* term.

How to discharge the defendant for want of proceeding to judgment and execution.

To proceed to discharge the prisoner for the not proceeding to judgment, or charging in execution in due time, apply, if the defendant is in custody of the sheriff, to the gaoler, for a copy of the causes he has against him, and what proceedings have been had; also make affidavit of his having signed the same; then take out a summons to shew cause, at a judge's

a judge's chambers, which serve on the plaintiff's attorney, or agent; if he does not attend, you will, upon the third summons, have an order of course, on an affidavit of the service, and due attendance; but if he should attend, and it is a country cause, at a distance, the first is an order nisi, within a limited time, to the agent, to write to his client, and then an order absolute, if no cause be shewn. The agents in town generally attend the summons, and order, unless cause be shewn in a week, &c.

Upon the order in either case being made, you issue out a writ of *superseas* for his discharge; which see hereafter.

J. G. of, &c. Gent. maketh oath, and saith, Affidavit of service of the summons.

That he did, on the day of last past, serve a true copy of the summons hereto annexed, on Mr. H. J. who acts as attorney or agent for the plaintiff in this cause, by leaving the same at the house of the said H. J. in *Fleet-street*, with the clerk or servant there. And this deponent further saith, That he did also serve Mr. H. J. with another true copy of the summons hereto annexed, by leaving the same with the clerk or servant of the said H. J. at his house aforesaid; and this deponent did also, on the day of last, personally serve

N. B. At the same time shewed him the original summons.

the said H. J. with a true copy of the summons hereto annexed. And this deponent did, on the several days mentioned in the said summons, duly attend at the chambers of the Right Honourable *Alexander Lord Loughborough*, in *Serjeants Inn, Chancery Lane, London*, but no one attended on behalf of the said plaintiff.

It is very common to save this affidavit, and the three summonses, by getting the plaintiff's attorney to go to the chambers, and the clerk will make an order upon hearing; but then a *superseas* issues.

George the Third, &c. To the Sheriff of W. greeting: Whereas A. B. is detained in our prison, under your custody, by virtue of our writ of *cepias*, issued out of our court, before our justices at *Westminster*, on, &c. (the return) to answer C. D. in a

Superseas on entering a common appearance.

plea of trespass, and also in a certain plea of trespass on the case, upon promises, to the damage of the said *C.* of 30*l.* whereby 20*l.* bail was directed to be taken: but because it sufficiently appears to our said justices at *Westminster*, that the said *A.* has appeared, by *W. R.* his attorney, to answer the said *C.* in the plea aforesaid, We command you, that if the said *C.* be detained in our prison under your custody, by virtue of the said writ, and for no other cause, that you will suffer him to go at large, as you will answer the contrary at your peril. Witness *Alexander Lord Loughborough*, at *Westminster*, the 28th day of *November*, in the twenty-fourth year of our reign.

Superfedeas for want of plaintiff's proceeding to judgment within three terms after declaration delivered.

George the Third, &c. To the sheriff of *S.* greeting: Whereas *A. B.* is detained in your custody, by virtue of our writ of *capias*, returnable before our justices at *Westminster, &c.* (the return) last past, to answer *C. D.* in a plea of trespass, and also in a certain plea of debt upon demand, for 40*l.*: And whereas the said *A.* afterwards (that is to say), on the 17th day of *May* last past, was charged with a declaration at the suit of the said *C.* in the plea aforesaid; but because it appeareth to our justices at *Westminster*, that the said *A.* hath appeared in our court of Common Pleas, to answer the said *C.* in the plea aforesaid; and that the said *C.* hath not proceeded to judgment against the said *A.* within three terms after the delivery of the said declaration, as required by the rules of our said court, We command you, that if the said *A.* be detained in our prison under your custody, for the cause aforesaid, and no other, you permit him to go at large, as you will answer the contrary at your peril. Witness, &c.

Superfedeas for not charging the defendant in execution within two terms.

George the Third, &c. To the warden of our prison of the *Fleet*, greeting: Whereas *M. D.* on the 21st day of *June* 1783, rendered herself to our said prison of the *Fleet*, before the Honourable Mr. Justice *Gould*, one of our justices of our court of the Bench, in discharge of her bail, at the suit of *W. R.* and *H. C.* for 40*l.*; and because the said

U. and

U. and H. have not proceeded to charge the said M. in execution within two terms next after judgment obtained, according to the rules of the said court of the Bench; We therefore command you, that if the said M. be detained in your custody, for that, and no other cause, that then you suffer her to go at large, as you will answer the contrary at your peril. Witness, &c.

*George the Third, &c. To the sheriffs of London, greeting: Whereas C. R. is detained in our prison under your custody, by virtue of our writ returnable before our justices at Westminster, on, &c. (the return), to answer J. M. in a plea of trespass, and also in a plea of trespass on the case, to the damage of the said J. of 100*l.*; and because it sufficiently appears to our said justices at Westminster, that the said C. hath appeared in our said court, and found sufficient bail to answer the said J. in the plea aforesaid; therefore we command you, That if the said C. is detained in our said prison, under your custody, by occasion of the said action, and no other, then you permit him to go at large, as you will answer the contrary at your peril. Witness, &c.*

Superedeas on putting in good bail.

Debtors in Execution.

How to be discharged out of Custody on the 32 Geo. 2. c. 28. called the Lords Act.

IF any person shall be charged in execution for a sum not exceeding 100*l.* and shall be minded to deliver up to his creditor, who shall so charge him, all his estate and effects, towards satisfaction of the debt, such prisoner, before the end of the first term which shall be next after such prisoner shall be charged in execution by his creditor, to exhibit a petition to any court of law from whence the process issued, upon which any such

Debtor charged in execution for any sum not exceeding 100*l.* &c,
May exhibit a petition to the court.

S f

prisoner

**Certifying there-
in, the causes of
his imprison-
ment, with a
schedule of his
real and personal
estate, at the
time of his first
imprisonment.**

**Fourteen days
previous notice
of such intende
petition to be
given to the cre-
ditor or his at-
torney.**

**With a copy of
the schedule.**

prisoner was or were taken and charged in execution as aforesaid, or into the court where any such prisoner shall be removed by *habeas corpus*, or shall be charged in custody, and shall remain in the prison thereof, certifying the cause of his imprisonment, setting forth not only a *just and true account of his real and personal estate, which he, or any in trust for him, is, was, or were intitled to, at the time of his petitioning; and of all incumbrances, if any there be, affecting any such real or personal estate of the person so petitioning, but also a just and true account of all the real and personal estate which any such prisoner, or any person in trust for him, or for his use, was or were interested in, or intitled to, at the time of his first imprisonment, either in possession, reversion, remainder or expectancy, to the best of his belief; and the securities, bonds, notes, and books, relating thereto, with the names, and places of abode of the witnesses.* And before any such petition shall be received, every such prisoner shall give, or leave, or cause, &c. unto and for all and every the creditors at whole suit he shall stand charged in execution, or his or her executors, &c. at his or their usual place of abode, or to or for his attorney or agent last employed in any such action, in case any such creditor cannot be met with, but not otherwise, fourteen days at least before any such petition shall be presented and received, a notice in writing, signed with the proper name or mark of such prisoner, importing therein, “That such prisoner doth, or do intend, to petition the court from whence the process issued, upon which he stands charged in execution, or into the prison to which any such prisoner shall have been removed by *habeas corpus*, or shall stand charged in execution on any judgment, recovered on any bill or declaration, filed or delivered in any such court.” And also setting forth, “a true copy of the account or schedule, including the whole real and personal estate of the person or persons so designing to petition, which he doth intend to deliver (other than and except the necessary wearing apparel and bedding of the prisoner, and his,

“ his, her, or their family, and the tools or instruments
“ of his trade or calling, not exceeding 10l. in the
“ whole.”

Affidavit of the due service of such notice to be left at the same time with the petition, and read openly, and a rule to be made upon receiving the petition, for bringing the prisoner into court, and summoning the creditor to appear personally, or by attorney, at some certain day to be specified; and the creditor appearing or not, in person, or by attorney, then upon affidavit of the due service thereof being made on him, her, or them, or his, her, or their attorney, if any such creditor, his, her, or their executors or administrators cannot be met with, such court shall, in a summary way, examine into the matter of every such petition, and hear what can or shall be alledged on either side, for or against the discharge of any such prisoner, who shall so petition, and order an assignment of his effects. But if the creditor shew cause of disbelieving his oath, and desire further time for information, the court is to remand the prisoner back to a further day, and the creditor not appearing, he may be discharged, unless the creditor insist upon his detention, and covenant to allow him 2s. 4d. per week. But upon failure at any time in the payment thereof, the prisoner, upon application to the court, to be discharged, &c. Where more creditors than one insist on the prisoner's detention, they are to pay him each not exceeding 1s. 6d. *Sett. 14.*

Affidavit of the service of such notice to be delivered with the petition; and a rule to be made, &c.

Oath being made of the service of the rule, the court to examine.

Creditor disbelieving the oath, &c.

Prisoners charged in execution in country and other gaols, distant from *Westminster twenty miles*, to proceed in like manner, by petition and affidavit, and the court to make a rule thereupon, for his being brought up to the next assizes, and a copy of the rule served on the plaintiff, &c.; and upon affidavit made of such service, the court to appoint a time for hearing the matter of the petition; and the creditor appearing thereto, or not, proof being made of their being duly served with the notice, and copy of the schedule of the prisoner's

Prisoners charged in execution in the country,

soner's estate, the court to proceed therein in a summary way, &c. and discharge the prisoner.
15.

In the Common Pleas,

John Denn against Richard Fenn.

John Denn,

The notice.

Take notice, that I do intend to petition his Majesty's court of *Common Pleas*, at *Westminster*, after the expiration of fourteen days next after notice hereof given [*If at the assizes, say, "For a rule or order that I may be brought before his Majesty's justices of assize, at the next assizes to be held at Oxford, in and for the county of Oxford,"*] that I may have such relief and benefit as I may be intitled unto, by virtue of, and under an act of parliament made in the thirty-second year of the reign of his late Majesty King George the Second, for the relief of debtors, with respect to the imprisonment of their persons; "*and the following is a true copy of the schedule which I do intend to deliver into the said court with my said petition;*" as witness my hand this day of 1781.

Witness *J. G.*

Richard Fenn.

If there is no schedule, then say, "*And that I shall not at the same time deliver in any schedule or inventory of any estate or effects whatsoever, having none (save and except the wearing apparel and bedding of or for me and my family, and the tools or instruments of my trade or calling, not exceeding 10l. in value in the whole.)*"

Schedule.

A schedule or inventory of all the estate and effects which I, R. F. a prisoner in execution, in the Poultry Compter, London, at the suit of J. D. or any person or persons in trust for me, was or were possessed of, or intitled unto, at the time of my first imprisonment, at the suit of the said J. D. or at any time since (except the wearing apparel and bedding of or for me or my family, and the tools or instruments of my trade

or calling, not exceeding 10l. in value in the whole),
to wit, (here set forth the inventory).

Real estate.—I have none, either in possession, re-
version, remainder, or otherwise.

Goods.—One old chair, six pewter plates.

Debts.—*J. W.* of Oxford, labourer, £. 2 0 0

Witness *J. G.*

R. F.

To the Right Honourable Alexander Lord Lough-
borough, Lord Chief Justice of his Majesty's Court
of Common Pleas, and the rest of the Justices of the
same Court.

The humble Petition of Richard Fenn,

Sheweth,

THAT your petitioner is a confined prisoner in Pet
execution, in the Poutry Compter, London, and was
taken in execution the day of 1782, at
the suit of *John Denn*, for the sum of 40l. debt, and
63s. damages, by virtue of his Majesty's writ of *ca-
pias ad satisfaciendum* issuing out of this honourable
court, as by the certificate hereto annexed appears.

That your petitioner humbly apprehends he is
entitled to the benefit of an act of parliament, made
in the 32d year of the reign of his late Majesty King
George the Second, for the relief of debtors, with
respect to the imprisonment of their persons, and is
willing and desirous to conform himself to the di-
rections of the said act of parliament.

That your petitioner hath not at the time of this
his petition, nor had he at the time he was taken in
execution, or at any time since, any debts, estates,
or effects whatsoever (other than and except the neces-
sary wearing apparel and bedding for himself and family,
and the tools or instruments of his trade or calling, not
exceeding ten pounds in value in the whole), besides
what is contained in the schedule or inventory hereto
annexed.

“ Your petitioner therefore most humbly prays

“ the order of this honourable court, direct-

* The gaol of Oxford, to bring him to the next assizes to be holden at Oxford in and for the said county.

"ing the keeper of the prison of * the
 " *Poultry Compter*, to bring your petitioner
 " into this court, at a day for that purpose
 " to be appointed; and the said *John Denn*,
 " then and there to shew cause, if any he
 " hath, against your petitioner's discharge,
 " and that your petitioner may have such
 " relief and benefit as he may be entitled
 " unto, under and by virtue of the said act.
 " *And your petitioner shall ever pray, &c.*

Witness *J. G.*

Richard Fenn."

Affidavit to be
 annexed,

J. G. of, &c. gentleman, maketh oath and faith,
 That he was present, and did see *R. F.* the petitioner,
 in the petition hereto annexed, sign the petition,
 notice, and schedule hereto annexed, and that the
 name *R. F.* set and subscribed at the foot of the said
 petition, notice, and schedule, are of the proper
 hand-writing of the said *R. F.* And this deponent
 further faith, That he did see *A. D.* the keeper of his
 Majesty's gaol or prison of the *Poultry Compter*,
 sign the certificate also hereto annexed, and that the
 name *A. D.* set and subscribed at the foot of the said
 certificate, is of the proper hand-writing of the said
A. D. And this deponent further faith, That he did,
 on the day of instant, personally
 serve the above-named plaintiff with a true copy of
 the notice and schedule hereto annexed, and did at
 the same time leave such copy of the said notice and
 schedule with the said plaintiff.

If necessary with
 the warden.

How to proceed.

The petition and affidavit are to be ingrossed on
 paper without a stamp, and of course to be sworn in
 town before a judge (pay nothing); in the country
 to be sworn before a commissioner; annex also a
 copy of the cause from the *gaoler* or *warden*; after
 affidavit sworn, leave it at the *secondaries*, who will
 give you a rule to bring up the defendant, and for the
 plaintiff to appear; serve a copy on the plaintiff,
 and also on the gaoler, of which make affidavit on
 plain paper; annex the rule to the affidavit *. The
 affidavit

* If at the af-
 fizes, the affida-
 vit is produced
 there of the ser-
 vice of the rule.

affidavit only goes to "*the service of both*," therefore it is a matter of course.

The defendant being an insolvent debtor, was brought into court a second time, and plaintiff being dead, his executors appeared, and prayed further time to enquire into the truth of defendant's discovery of her effects, but the court refused to enlarge the time, which is limited by the act, and refused to discharge the prisoner. *Luker v. Wallis. Barnes 370.*

Cannot bring a prisoner up more than twice.

Plaintiff's attorney appeared, and offered to sign a note for 2s. 4d. per week, to be allowed defendant in order to continue him in prison in execution at the plaintiff's suit, held not sufficient. *Ibid. 371. Warrington v. Elliott.*

Plaintiff's attorney cannot sign a note.

All objections as to the insufficiency of a prisoner's schedule of his effects in point of form, are to be made up on the first attendance: The second time the prisoner is brought up, the plaintiff must be prepared to falsify the account given by defendant of his effects, if he can; he will be too late to object to the schedule in point of form. *Ibid. 372. Jenner v. Swan.*

Objections to the schedule in point of form, to be made the first time.

Proceedings by Habeas Corpus.

THERE are several writs of *habeas corpus*, Habeas corpus, to which the subject is intitled by common right, when he is deprived of his liberty. But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, *with the day and cause of his caption and detention, ad faciendum, subjiciendum, & recipiendum*, to do, submit to, and receive, whatsoever the judge or court awarding such writ, shall consider in that behalf. *State Trials, vol. 8. 142.*

To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and, in the end, would destroy all civil liberty, by rendering its protection impossible; but the glory of the *English law* consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment, the reason for which it is made; that the court upon an *habeas corpus* may examine into its validity; and according to the circumstance of the case may discharge, admit to bail, or remand the prisoner.

No *habeas corpus* lies for an enemy, prisoner of war, however ill used or deceived. 2 *Black. Rep.* 1324.

Delays made originally in issuing and returning this writ,

Great delays were made in granting this writ, because the judges who had authority to issue it, pretended to have power either to grant, or deny it; not only that, but the party imprisoning, was at liberty to delay his obedience to the first writ, and might wait till a second and third, called an *alias* and *pluries*, were issued, before he produced the party; and many other vexatious shifts were practised to detain prisoners in custody, particularly state prisoners. *State Trials*, vol. 7. 136.

This oppression gave birth to the famous *habeas corpus* act, 31 *Car. c. 2.*; which is frequently considered as another *magna charta* of the kingdom; and by consequence has also, in subsequent times, reduced the method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty. 3 *Black. Com.* 135.

Attachment for not obeying it.

This statute has remedied every inconvenience the prisoner was subject to; for if not obeyed within a reasonable time, the officer or sheriff is subject to a large penalty, besides an attachment for his contempt of the court from whence it issued.

For

For further particulars as to this writ, *Vide Blackstone's Commentaries*, title *habeas corpus*.

I shall now proceed to shew how the defendant may be removed from imprisonment in a common gaol, or spunging-house, where he is detained by civil process; therefore, if the defendant be detained either on a writ issued out of this court, or by a plaint issued out of the inferior courts, as the *mayor, or sheriff's court, London*, and wishes to receive the benefit of the prison of this court (*which is both airy and wholesome*), he may, by getting a creditor to make affidavit of a debt of 1*cl.* or upwards in this court, issue out a writ thereon, and bring a *habeas corpus ad faciendum & recipiendum*, which is commonly called a *habeas corpus cum causa*, "because it commands the sheriff, or person in whose custody he is, to bring him before the chief justice therein named, or, in his absence, any other justice of the same court, together with the day and cause of his caption and detainer, to do and receive whatsoever shall be considered of him in that behalf;" who upon reading the causes returned, will of course commit him to the *Fleet* prison; but if he be already in custody, by virtue of a writ issued out of this court, he may have this writ in the first instance to go to that prison.

This writ, in the fifth year of the reign of *Charles II.* could not be returnable immediately, or in the vacation, unless the party was in prison in *London or Middlesex*, or in order to deliver him over in discharge of his bail; but since the statute of *William III.* which gave liberty to a plaintiff (instead of bringing his prisoner to this court at the great expence of the writ of *habeas corpus ad respondendum*), to charge him with a declaration in prison, it has been determined, that in all civil suits, this writ may be had returnable immediately, before a judge at his chambers, and may now be sued out, without any previous motion made. *Vide 3 Burr.* 1876. And that if the sheriff, &c. do not obey it in convenient time, he will not only be subject to

the penalties in the 31 Car. 2. but to an attachment for his contempt, that sort of punishment being the spirit of the act of Parliament. *Vide 2 Burr. 854.*

To proceed therefore regularly to obtain this writ, we must first shew how to remove the body that is in custody, either by process out of this court, the King's Bench, or any inferior jurisdiction, and afterwards how the cause may be removed, if the defendant does not wish it to be decided by the inferior jurisdiction.

How to remove the Body from the Custody of the Sherfff, on a King's Bench Process, to the Fleet Prison.

IF the defendant be detained on a writ out of the King's Bench, and wishes to go the Fleet prison, he must get a writ sued out of this court for 10*l.* or upwards, to warrant his going by *habeas corpus*; in that case an affidavit is made of the debt before the filacer, and a *capias* sued out, and left with the *habeas corpus*, at the sheriff's office; which being returned, the sheriff's officer takes the defendant to the chief justice's chambers, or in his absence any other judge of this court, who will commit him.

If in an inferior jurisdiction.

But if in custody already.

If he is in custody in an inferior jurisdiction, as the sheriff's court of London, &c. then he may be removed to the said prison, in the first instance by *habeas corpus*, because that writ removes the action with the body into this court. And if in custody already upon a writ issued out of this court, an *habeas corpus* may be sued out in the first instance, and left with the sheriff for his return; whose officer brings up the defendant before the judge, as before, to be committed.

How to sue out the Habeas Corpus.

THE *habeas corpus* is now printed on a 5*s.* stamp, and may be had at the stationers in blank; but in case

case it is not to be had, I shall here insert the form thereof, which is as follows :

George, &c. To the sheriffs of *London*, greeting : *Habeas corpus.*
We command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before *Alexander Lord Loughborough*, our chief justice of the Bench, at his chambers, situate in *Serjeant's Inn, Chancery-lane*, immediately after the receipt of this our writ, to do and receive all and singular those things which our said chief justice shall then and there consider of him, in this behalf ; and have there this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 28th day of *November*, in the 24th year of our reign.

J. K. Attorney.

London. *Habeas Corpus* for *C. D.* to do and receive, returnable immediately. *J. K.*

This you take to the prothonotaries office ; pay judge's fee and signing 5s. 4d. seal 7d. Take the same to the sheriff's office in the *Poultry*, or *Wood-Street*, where the action is, who will return the same. If, in *Middlesex*, take it to the sheriff's office in *Took's court, Curfitor-Street*.

Though this writ is returnable before the chief justice, yet any other of the judges may commit the prisoner. *Any judge may commit.*

When the sheriff has returned your writ, an officer will take the prisoner to the judge's chambers ; get a tipstaff, and he will then commit the defendant, pay the officer 10s. 6d. *How to proceed after return got from the sheriff.*

If the *habeas corpus* be in *Middlesex* or *London*, pay the sheriff 9s. 4d. for the first action, 2s. 4d. for every other, *mittatis*, 2s. 4d. ; and if the defendant is in *Newgate*, 2s. 4d. for warrant to deliver. *Fees for the sheriff.*

If it be from the palace court, pay 5s. for allowing, and 4d. for the *jurat*. *Palace court.*

The

The above form will do for all counties, only direct it to the sheriff, in whose custody the defendant is.

Fees in the country.

If you remove a person from the country, the sheriff is paid *1s. per mile* for bringing him to town, and the judge will not (it is said) commit the defendant, unless the sum is paid: But the officer must obey the writ, though the prisoner refuses to pay his fees, for he has another remedy for them. *2 Str. 814.*

Defendant not to be discharged, till bail perfected.

If the defendant be returned in custody, on a *habeas corpus*, he is not to be discharged until he perfects his bail.

How to remove the Cause from the Inferior Courts.

BEFORE we proceed to shew the mode how to remove the cause, it may be proper to state the several acts of Parliament relating thereto; and first the act 21 *Jac. 1. c. 23.* being an act to avoid vexatious delays by the removal of frivolous causes, enacts, "That where the judge of an inferior court is an utter barrister of three years standing at the bar, no cause shall be removed from thence by *habeas corpus* or other writ, except it be delivered before issue, or demurrer joined in the said cause, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant to such action." *Stat. 2.*

No suit shall be removed, unless writ be delivered before issue or demurrer joined.

"That no cause, if once remanded to the inferior court by writ of *procedendo*, or otherwise, shall ever afterwards be again removed." *Stat. 3.*

A suit once remanded, shall never afterward be removed.

"And that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of *5l.*" But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for *5l.* or upwards (and then by the

courts

course of the court the *habeas corpus* removed both actions together), it is therefore, by statute 12 Geo. 1. c. 29. §. 3. enacted, "That the inferior court may proceed in such actions as are under the value of 5*l.* notwithstanding other actions may be brought against the said defendant to a greater amount."

And in order to prevent delays being made in trying causes in inferior courts, which were frequently practised by the 43 *El.* c. 5. it is enacted, "That such writ of *habeas corpus* shall be delivered to the judge before that the jury have appeared, and one of them sworn to try the cause." *Stat.* 2.

By the 19 Geo. 3. c. 70. §. 6. it is enacted "That no cause, where the cause of action shall not amount to the sum of 10*l.* or upwards, shall be removed or removeable into any superior court, by any writ of *habeas corpus*, or otherwise, unless the defendant, who shall be desirous of removing such cause, shall enter into recognizance for the payment of the debt and costs, in case judgment shall pass against him; as in *sect.* 5."

By *sect.* 4. it is enacted, "That in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, it shall and may be lawful to and for any of his Majesty's courts of record at *Westminster*, upon affidavit made and filed therein, of such judgment being obtained, and of diligent search and inquiry having been made after the person or persons of the defendant or defendants, or his, her, or their effects, and of execution having issued against the person or persons, or effects of the defendant or defendants, are not to be found within the jurisdiction of such inferior courts, which affidavit may be made before a judge or commissioner authorised to take affidavits, and such superior courts to cause the record of the said judgment to be removed into such superior court, to issue writs of execution thereupon to the sheriff of any county, city, liberty, or place, against the person or persons, or effects of the defendant or defendants, in

If judgment be obtained in the inferior court, and the defendant cannot be found, how to proceed.

" the

“ the same manner as upon judgments obtained in
 “ the said courts at *Westminster* ; and the sheriff,
 “ upon every such execution, shall, and he is here-
 “ by authorised to detain the defendant or defend-
 “ ants, until the sum of 20s. be paid to him, or levy
 “ the same out of the effects, according to the na-
 “ ture of the execution, for the extraordinary costs
 “ of the plaintiff or plaintiffs in the inferior court,
 “ subsequent to the said judgment, and of the exe-
 “ cution in the superior court, over and above the
 “ money for which such execution shall be issued.

Upon what con-
 dition execu-
 tions shall be
 stayed upon any
 writ of error, &c.
 for reversing
 judgment given
 in an inferior
 court : here the
 s are un-

“ That no execution shall be stayed or delayed
 “ upon, or by any writ of error or *superfedeas* there-
 “ on to be sued, for the reversing of any judgment
 “ given, or to be given, in any inferior court of
 “ record, where the damages are under 10*l.* unless
 “ such person or persons, in whose name or names
 “ such writ of error shall be brought, with two suf-
 “ ficient sureties, such as the court (wherein such
 “ judgment is or shall be given) shall allow of, shall
 “ first, before such stay made, or *superfedeas* to be
 “ awarded, be bound unto the party for whom any
 “ such judgment is or shall be given by recogni-
 “ zance, to be acknowledged in the same court,
 “ in double the sum adjudged, to be recovered by the
 “ said former judgment, to prosecute the said writ
 “ of error with effect, and also to satisfy and pay
 “ (if the said judgment be affirmed, or the said writ
 “ of error be *nonprossed*) all and singular the debt,
 “ damages, and costs, adjudged or to be adjudged,
 “ and all costs and damages to be awarded for the
 “ same delay of execution.” *Stat. 5.*

Habeas corpus
 to remove the
 cause.

George the Third, &c. To the sheriffs of *London*,
 greeting : We command you that you have the body
 of *C. D.* detained in our prison under your custody,
 as it is said, under safe and secure conduct, toge-
 ther with the day and cause of his being taken and
 detained, by whatsoever name he shall be called in
 the same, before *Alexander Lord Loughborough*, our
 chief justice of the bench, at his chambers, situate
 in *Serjeant's Inn, Chancery-Lane*, immediately after
 “ the

the receipt of this writ, to do and receive all and singular those things which our said chief justice shall then and there consider of him in this behalf; and have there then this writ. Witness *Alexander Lord Loughborough*, at *Westminster*, the 19th day of *June*, in the 22d year of our reign. To bear test in term.

London. ha. corp. for *C. D.* to do and receive re-Præcipe, turnable immediately.

T. K. Attorney.

To be taken to the prothonotaries office, pay judge's *allocatur* and signing 5s. 4d. seal 7d. take same to the office where the action is entered, and if but one cause, and above 10l. pay 4s. 10d. for the allowance, fee to the judge 2s. 4d.

If it be brought to remove a cause out of the inferior court *under* 10l. then bail must be put in, and two days notice *exclusive* given for their coming into the court below, and becoming bail for the defendant, in order that the plaintiff's attorney may have an opportunity of enquiring into their sufficiency, and upon their entering into a recognizance, before the judge, for the payment of the debt and costs, then the judge will order the allowance of the writ. How to proceed before allowances to be made of habeas corpus.

Upon the bail being allowed in the court below, the first step the plaintiff's attorney takes, is to apply to a judge for a rule, for the defendant to put in bail thereon within four days, if in term, if in vacation, six days; pay for same in term 1s. in vacation 2s. serve defendant's attorney with a copy thereof, and if he does not put in bail within the four or six days next after service, nor take out a summons for him to put in bail, which he may do, then the plaintiff may issue out a writ of *procedendo*. *R. 13 & 14 Car. 2.* Upon obtaining certificates, that no bail is filed from each judge, which certificates are to be delivered to the prothonotaries clerk, before the signing the *procedendo*, pay each certificate 4d. How to proceed after the allowance.

N. B. This practice is attended with very great inconvenience, and this court has suffered much from the not being able to obtain these certificates Observation as to the inconvenience of the practice of this in court.

in case the judges are out of town, by which means the *K. B.* has most of this business, for there the attorney signs the *procedendo* at his peril, and as notice is to be given of such bail being put in, surely there can be no reason for a certificate, that none is put in.

How to proceed
for defendant.

But if the defendant puts in his bail, then he is to apply to the sheriff, &c. for a return of the *habeas corpus*, to annex to the bail-piece, as it may appear what the causes are for which defendant is arrested: This being done, apply to Mr. *Underwood*, who will fill up the bail-piece, and attend one of the judges to put them in; pay judge 7*s.* 6*d.* in vacation, and 5*s.* in term, prothonotaries fees 2*s.* Mr. *Underwood* 3*s.* 4*d.* for his attendance.

In the Common Pleas.

Mi haelmas Term, in the 24th year of the reign of King *George the Third*.

Bail-piece.

London, } *Habeas corpus* for *Richard Roe*, at the suit of *John Doe*, in a plea of trespass on the case; damage 40*l.*
to wit, } each for 20*l.*

The bail are, *John Denn*, of *Cheshide*, *London*, gentleman,
and

T. G. Defendant's } *Richard Fenn*, of the same, gentleman.
Attorney. } Each of the bail in 40*l.*

Taken, &c.

N. B. If the defendant joins, then the bail are bound in the sum sworn to.

Recognizance of
bail.

" You *John Denn and Richard Fenn* are bail for
" *Richard Roe*, at the suit of *John Doe*, and ac-
" knowledge to owe to the said *John Doe* the sum of
" 40*l.* upon condition that the defendant do appear to a
" new original, to be filed in the court of Common
" Pleas within two terms, and if he be condemned in
" the action, he shall pay the condemnation money, or
" render his body a prisoner to the Fleet; and if he
" fails so to do, you the bail, severally undertake to do
" it for him."

If the cause returned be under 10l. then the recognizance is taken for the debt and costs, and not to render. *Vide Stat. 19 Geo. 3. c. 570. s. 6.*

When the bail is put in, notice in writing is to be given to the plaintiff's attorney, of the names and additions, the time when, and the judge before whom the same is put in. *R. Hil. 13 & 14 Car. 2.*

In the *Common Pleas*,

John Doe against Richard Roe.

Take notice, that special bail was this day put in upon the *habeas corpus* issued in this cause, before the Honourable Mr. Justice Gould, at his chambers, in *Serjeant's Inn, Chancery Lane, London*, and the names are *John Denn of Cheapside, London, Gentleman*, and *Richard Fenn of the same, Gentleman*.
Dated, &c. Yours, &c.

To Mr. R. T. Attorney for the plaintiff. A. K. Attorney for the defendant.

If the plaintiff's attorney does not like the bail, he may (instead of entering an exception) apply to the judge's clerk for a rule for better bail, which is returnable in four days next after service, a copy of which is to be served on the attorney for the defendant: if the bail do not justify within the four days (provided there are four days in the term left) then you may apply to the judge before whom the bail are put in, for his certificate of their not having justified, pay 4d. take same to the prothonotaries with your writ of *procedendo* (which you will make out), and the clerk will sign it: the form of which see hereafter.

If there are not four days in term after rule served, then notice must be given to justify on the first day of the next term; which being done, no *procedendo* can issue.

N. B. Plaintiff must take out his rule for better bail, and serve same, within twenty days after such bail taken. *R. H. 13 & 14 Car. 2.*

T c.

Take

Notice of justification.

Take notice that the bail already put in for the defendant in this cause, upon the writ of *habeas corpus*, and of whom you have had notice, will, on *Monday* next, justify themselves in open court, as good and sufficient bail for the said defendant. Yours, &c.

Two days notice of justification.

This notice must be given two days, exclusive of the day of justification, and defendant may add to the bail already put in, but care is to be taken to pursue the new rule in that case, of *M. 20 Geo. 3. p. 180*. Make affidavit of the service thereof, and speak to Mr. *Underwood* to get the bail piece of the judge's clerk to take to *Westminster*; pay him his fee of *3s. 4d.*; give brief to a serjeant *10s. 6d.*; in the evening draw up rule for the allowance at the secondaries, and serve copy on plaintiff's attorney.

Rule of Hil. 13 & 14 Car. 2. concerning bails on hab. corp.

That writs of *habeas corpus*, directed to the inferior courts of *London, Westminster, Southwark*, and other courts within five miles of *London*, may be returnable *immediatè*. And if the defendant intendeth to be bailed, then upon, or within *four days* after allowance of the writ, the day of which allowance being indorsed by such officer as allows the same, on the back of the said writ, notice is to be given in writing of the names and additions of the bail, *the time when, and the judge before whom the same is intended to be put in, to the plaintiff or his attorney*, or him that caused the plaint to be entered, or if none can be found, then notice of the premises to be left in writing with the chief clerk of the inferior court, or his deputy, by the party that tenders the bail, or his attorney, and oath made thereof, otherwise the bail not to be taken, and a *procedendo* granted if desired, before bail excepted: That if no bail in such cases be put in within *eight days* after *habeas corpus* allowed in those courts, when it is returnable *immediatè*, a *procedendo* may be granted by any judge of this court, if desired, before bail taken; and if bail be taken in the absence of the plaintiff, or his attorney, the same is to be taken *de bene esse*; and if no exception be taken within twenty days after the bail

Notice of bail must be given.

If no bail be put in within eight days after hab. corp. allowed, a *procedendo* may be granted.

bail taken, notice having been given as aforesaid, then the bail to be delivered out to be filed.

That if a bail upon a *habeas corpus* be taken before a judge at his chamber, and not disassented unto, if not filed within four days after the twenty days, a *procedendo* may be granted upon certificate that it is not filed: That in term time the plaintiff in the inferior court may speed the defendant, to put in and file his bail by rules given in the bill of pleas; and if not filed according to the rules upon certificate thereof, a *procedendo* to be granted. *Ibid.*

Ball on hab. corp. to be filed within four days after twenty days. Rules may be given to put in bail.

That all writs of *habeas corpus*, returnable in court, be returnable at a day certain.

That upon bail taken of persons in custody, the judge's clerk to deliver the bail to the prothonotary to be filed, if assented unto; and to that end the prothonotary's fees to be deposited; but the prisoner not to be discharged until the bail be assented unto, or over-ruled in open court. *Ibid.*

Bail taken of persons in custody, the judge's clerk to deliver the bail to the prothonotary.

If there are more causes than one returned, bail must in that case be put in for the whole. *Salk.* 352.

The defendants cannot nonpros the plaintiff for want of a declaration, he not being bound to follow him.

Cannot nonpros.

When bail is put in, the plaintiff may, if he means to follow the defendant, declare against him *de bene esse*, or if justified (*in chief*), and all the proceedings are *de novo*, for the record is not removed on a *habeas corpus*, as it is on a *certiorari*. *Salk.* 352. But such declaration is to be delivered within two terms. *Barnes* 90. *Vide* the recognizance. In this court it has been held, that on a *certiorari*, though parties were at issue in the court below, yet plaintiff must declare *de novo*. *Barnes* 345. *Turner v. Bean.*

How to declare.

The declaration is exactly in the same form as others, therefore no need to insert it here.

If a cause be removed by *habeas corpus* out of the courts of *Canterbury*, *Southampton*, *Hull*, *Litchfield*, or *Pool*, and the action be transitory, it must be laid in the county wherein such city or town is, as *Kent*, *Southampton*, *York*, *Stafford*, or *Dorset*.

If removed out of the courts of Canterbury, &c. where venue is to be laid.

When to plead.

I take it that the defendant is to plead to the declaration within the same time as others, but he is not in any case intitled to an imparlance, unless by special leave of the court, or judge, although declaration be delivered the last day of the term.

Defendant was arrested, and before removal of the plaintiff married, and afterwards pleaded coverture.

Defendant, whilst a *feme sole*, was arrested in the palace court, and a day or two after the arrest married, and then removed the plaintiff by *habeas corpus* into this court, and pleaded her coverture in abatement. Rule made absolute to set aside the plea, upon hearing counsel on both sides. *Barnes* 355.

Moved for a *procedendo* to *Boston Borough Court*. *Habeas Corpus* to remove the cause being brought, after interlocutory judgment in the inferior court: *Cur.* thought it too late after judgment, and made the rule for *procedendo* absolute. *Wyate v. Markham*. *Barnes* 221. The contrary is the practice, and so determined in 2 *Burr.* 759. *Cox v. Hart*. The inferior court allow it any time before jury sworn, and so there determined notwithstanding, 21 *Jur.* 1. & 23.

If an action be brought against a *feme covert* as a sole trader, such action cannot be removed by *habeas corpus* from the city court. 2 *Black. Rep.* 1060. *Pope* against *Vaux* and *Wife*. If it is, you may move for a *procedendo*. *Ibid.*

If the cause is only maintainable in the court below, not to be removed.

Upon an *habeas corpus* to remove a cause out of an inferior court, a *procedendo* shall be awarded, if it appears that the action is maintainable there only. *Carth.* 75.

The court will not enter into a bye-law (except London).

On a return of a bye-law, the court will not enter into the validity of it, in order to grant a *procedendo* (except in London); but plaintiff must declare here, and defendant may demur, if he has objections. 2 *Burr.* 775.

If an action be brought against two partners, and one brings a *hab. corp.* the

In an action against two partners, if one brings a *habeas corpus*, and puts in bail for himself only, plaintiff shall have a *procedendo*. *Fry v. Carey*, *Str.* 527. plaintiff shall have a *procedendo*.

Frequently plaintiffs in the mayor or sheriff's courts, *London*, bring debt upon the custom, in order to ground an attachment, and after removal the plaintiff cannot declare in such action in the superior court, *in debt*, because his debt may arise on simple contract; therefore, in order to enable him to declare in such action, he must move the court in term for a rule to shew cause why a *procedendo* should not issue, unless the defendant will accept a declaration in case; and if the defendant should not agree to accept such declaration, the court will grant a *procedendo*; if in vacation, it's done by a judge's summons.

If the action be in the courts of *London* in debt, and the cause is removed after an attachment dissolved, how to proceed, if the action cannot be maintained in the superior courts.

Procedendo.

IF the defendant does not put in or justify his bail in due time as before said, then issue the following writ of *procedendo*.

George the Third, &c. To the sheriffs of *London*,
greeting: Although we lately by our writ commanded you, that you should have the body of *C. D.* detained in our prison under your custody, as it was said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* might be called in the same, before *Alexander Lord Loughborough*, at his chambers in *Serjeants-Inn, Chancery-lane*, immediately after the receipt of that writ, to do and receive all and singular those things which our said chief justice should then and there consider of him in that behalf; yet for certain causes in this behalf specially moving our justices of the Bench aforesaid, at *Westminster*, We command you, and every of you, that in all complaints and suits against the said *C. D.* at the suit of *A. B.* in our court, before you, or any of you, now depending undetermined, you proceed with what speed you can, in such manner, according to the law and custom of our kingdom of *England*, as you shall see proper, our said writ to you first there-

Writ of *procedendo*.

Habeas Corpus.

upon directed to the contrary in any wise notwithstanding. Witness *Alexander Lord Loughborough*, at *Westminster*, the 28th day of *November*, in the twenty-fourth year of our reign.

To be ingrossed on a 2s. 6d. stamp parchment, and to be signed by prethontary; pay 1s. 4d.; seal 7d. allowing 6s. 10d. attorney's fee below, 3s. 4d.

If the bail surrender the defendant, apply to Mr. *Underwood* for that purpose, who will attend with the bail-piece before a judge, and get surrender made; pay him 5s. 4d.; judge's fee in term 13s.; in vacation 13s.; and notice must be given of such surrender, but no affidavit or *exoneratur* necessary.

Directions to the Inferior Courts.

As a habeas corpus, and procedendo, must be directed properly to the inferior courts, such of them as I can collect are as follow:

- | | |
|--|---|
| Mayor's court,
London. | <i>To the mayor, aldermen, and sheriffs of London.</i> |
| Sheriff's court of
city. | <i>To the sheriffs of the city of London.</i> |
| Marshalsea. | <i>To the judges of our court of our palace of Westminster, and to each of them, greeting.</i> |
| If in sheriff's
court in the
county. | <i>If it's in the sheriff's court of any county, direct it to the sheriff, as Middlesex, Berks, Oxford, &c.</i> |
| Stepney. | <i>To the steward of our court of record, within the manors of Stepney and Hackney, in the county of Middlesex, hamlets and liberties of the same, and also to the high bailiff of the said liberty, and to either of them.</i> |
| Marsh. al. | <i>To the marshal of our Marshalsea before us.</i> |
| Warden of the
Fleet. | <i>To the warden of our prison of the Fleet.</i> |
| Bristol. | <i>To the mayor, aldermen, and sheriffs of the city of Bristol, and to the mayor and constables, keepers of the staple of the same city, and also to the bailiffs, mayor, and community of the same city, in their court of Tolsey.</i> |
| Bath. | <i>To the mayor, recorder, aldermen, and justices of the city of Bath, in the county of Somerset, and to every of them.</i> |
| Bedford. | <i>To the mayor, aldermen, burgeses, and recorder of the town of Bedford, in the county of Bedford.</i> |

Habeas Corpus.

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To the mayor, aldermen, and burgesſes of the town of Beverley.
Beverley, in the county of York.

To the bailiff and burgesſes of the town of Buck- Buckingham.
ham, in the county of Buckingham.

To the mayor, recorder, and burgesſes of the borough Bury St. Ed-
of Bury Saint Edmonds, in the county of Suffolk. *monds.*

To the mayor and bailiffs of the town of Cambridge. Cambridge.

To the ſteward of the liberty of Thomas by Divine Canterbury.
Providence, archbiſhop of Canterbury, in the court of
his palace within the city of Canterbury.

To the mayor and bailiffs of our city of Exeter, in Exeter.
the county of Devon, and to the bailiffs, citizens, and
provoſts, of the ſame city.

To the mayor, aldermen, and citizens of the city of Hereford.
Hereford.

To the mayor and capital burgesſes of the borough of Hertford.
Hertford, in the county of Hertford, and alſo to the
ſteward of our court of record there.

To the mayor and ſheriffs of our town and county of Kingſton upon
Kingſton upon Hull, in the county of York. *Hull.*

To the bailiffs and ſteward of our court of our town Dutton
of Kingſton upon Thames; and in the abſence of the *Thames.*
ſaid ſteward, to the bailiffs and recorder of the ſame
town, or any two of them.

To the mayor, ſheriffs, and citizens, of the city of Lincoln.
Lincoln.

To the bailiffs, burgesſes, and citizens of the city of Litchfield.
Litchfield.

To the mayor and recorder of our town or borough of King's Lynn.
King's Lynn, in the county of Norfolk.

To the ſteward of the dean and chapter of the colle- St. Martin's le
giate church of Saint Peter, Weſtmiſter, of the court Grand.
of their liberty or precincts of Saint Martin's the Great,
in London, and the conſtables there.

To the mayor, aldermen and burgesſes of the borough Newbery.
of Newbery, in the county of Berks.

To the mayor and bailiffs of the town and borough of Northampton.
Northampton, in the county of Northampton.

To the mayor, aldermen, and ſheriffs of the county of Norwich.
the city of Norwich.

Oxford.	<i>To the mayor and bailiffs of the city of Oxford, in the county of Oxford.</i>
Portsmouth.	<i>To the mayor, aldermen, and burgesſes of the town of Portsmouth.</i>
Southampton.	<i>To the mayor and bailiffs of our town of Southampton.</i>
Taunton.	<i>To the bailiff of the reverend father in Chriſt, lord biſhop of Wincheſter, of his liberty of Taunton and Taunton Dean, in the county of Somerſet.</i>
Thetford.	<i>To the mayor and recorder of our borough of Thetford, in the county of Norfolk.</i>
Wells.	<i>Wells, borough or city. To the ſteward or bailiff of our court of our pleas, granted to the reverend father in Chriſt, biſhop of Bath and Wells, held at the Guildhall, within the city and borough of Wells, in the county of Somerſet.</i>
Woodſtock.	<i>To the mayor of the town of New Woodſtock, in the county of Oxford.</i>
Worceſter.	<i>To the mayor, recorder, and aldermen of our city of Worceſter, and to every, &c.</i>
York.	<i>To the mayor, aldermen, and ſheriffs, of the city of York.</i>

Hab. corp. ad
teſtificandum.

This writ alſo is iſſued where a witneſs is confined in priſon, directed to the maſhal, ſheriff, &c. in order to bring him before the court where the cauſe is to be tried, to give evidence on the part of the perſon who ſues it out, and is called an *habeas corpus ad teſtificandum*, the form of which, and the mode of obtaining it, ſee in page 400.

Hab. corp. ad
ſatiſfaciendum.

It is alſo made uſe of by a plaintiff in this court, where his priſoner has removed himſelf, after declaration, to the *King's Bench*, in order to bring him here, to charge him in execution upon judgment obtained, and it is called an *habeas corpus ad ſatiſfaciendum*, to ſatiſfy or make ſatiſfaction to the plaintiff, the debt and damages by him recovered; which being obeyed, the court commit him again to the cuſtody of the warden, there to remain until he make ſatiſfaction.

This

Habeas Corpus.

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This writ is always made returnable on a day certain, as the prisoner cannot be committed in execution but by the court, whilst they are sitting.

A *habeas corpus ad satisfaciendum* may issue to the warden of the *Fleet*, or the keeper of any inferior prison, of a liberty or franchise, returnable in court at a day certain; and the number-roll of the judgment to be indorsed upon the writ by the attorney who sues it out; and such writ shall be a good cause of detainer. *R. Mich. 1654.*

<p><i>Ha. corp. ad satisf. in case.</i></p>	<p><i>Ha. corp. ad satisf. in debt.</i></p>
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<p><i>George, &c.</i> To the warden of the prison of the <i>Fleet</i>, greeting: We command you, that you have before our justices at <i>Westminster</i>, on <i>Wednesday</i> next after the morrow of <i>All Souls</i>, the body of <i>C. D.</i> under safe and secure conduct, detained in our prison under your custody, as we are informed, together with the day and cause of his being taken and detained, by whatsoever name the said <i>C. D.</i> is there known, to satisfy <i>A. B.</i> 25<i>l.</i> for his damages, which he has sustained, as well by not performing certain promises and undertakings lately made by the said <i>C.</i> to the said <i>A.</i> at <i>Westminster</i>, in the county of <i>Middlesex</i>, as for his costs, and charges by him laid out, about his suit, in that</p>	<p><i>George, &c.</i> To the warden of the prison of the <i>Fleet</i>, greeting: We command you, that you have before our justices at <i>Westminster</i>, on <i>Wednesday</i> next after the morrow of <i>All Souls</i>, the body of <i>C. D.</i> under safe and secure conduct, detained in our prison under your custody, as we are informed, together with the day and cause of his being taken and detained, to satisfy <i>A. B.</i> as well a certain debt of 25<i>l.</i> which the said <i>A. B.</i> in our court, before our justices at <i>Westminster</i>, recovered against the said <i>C. D.</i> as also 10<i>l.</i> for his damages, which he sustained by reason of the detaining the said debt, as for his costs,</p> <p style="text-align: right;">behalf,</p>
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behalf, whereof the said *C.* is convicted; and further to do and receive what our said court shall then and there consider of him in this behalf; and have there then this writ. Witness *Alexander* Lord *Loughborough*, at *Westminster*, the 28th day of *November*, in the twenty-fourth year of our reign. Pay prothon. signing 1s. 4d. seal 7d. at the *Fleet* 9s. 4d. secondary 9s. tipstaff 10s. 6d.

You should have the roll in court, and the secondary marks thereon the *ba. corp.* and *commitment* by the court, in the margin of the judgment. *R. M.* 1654.

Paupers.

A PAUPER, is a person said to be, by the law, so poor and indigent in his circumstances, that he cannot dispend the usual charges to recover his right, either in *law* or *equity*.

It appears in very early times, viz. 1495, that poor persons having any claim to lands, or other right, were frequently obliged to drop the pursuit thereof in a court of *law* or *equity*, the expence being too great for them to bear: This being a great grievance to the subject, and in order that men should not be stripped of their legal possession and right, by the *Stat.* of 11 *H. 7. c. 12.* It is enacted in the following words, *which deserve to be written in letters of gold, viz.* Prayen, "the Commons
" in this present Parliament assembled, that where
" the King our Sovereign Lord, of his most gracious disposition, willeth and intendeth indifferent justice, to be had and ministered according to his common laws, to all his true subjects, " *as well to the poor as rich,*" which poor subjects be not of ability nor power to sue according to the *laws* of this land, for the redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritance,

Therefore if the plaintiff is so poor as above stated, he must petition to one of the judges of this court to be admitted to sue in *forma pauperis*; and if he has begun the suit, and not able to carry on the same, yet he may, after petition, be admitted. Ingross it on a treble 6d. stampd paper, annex also the affidavit thereto on treble 6d. then take same to the judge's chambers, and after oath is made thereof, the clerk will make out an order thereon; pay him 2s. 6d. The form of the petition and affidavit are as follow:

That the said defendant is and stands justly indebted unto your petitioner in the sum of 10*l*. for the work and labour of your petitioner, done for

Paupers.

the said defendant, at his request; and your petitioner hath commenced an action against him for the same.

That your petitioner finds himself unable to carry on the said cause, on account of his extreme poverty, as appears by the affidavit hereto annexed.

I humbly conceive that the said petitioner hath good cause of action against the above-named C. D. and humbly accept to be his counsel

J. C. B.

"Your petitioner therefore
"most humbly prays your
"Lordship, that he may be
"admitted in *forma pauperis*,
"to prosecute his said ac-
"tion, and that J. C. B. esq;
"may be assigned to him as
"his counsel, and A. G. his
"attorney, to prosecute his
"said suit.

"And your petitioner shall
"ever pray, &c.

Common Pleas.

A. B. agt. C. D.

Affidavit.

A. B. of, &c. yeoman, maketh oath and saith, That he is not worth *five pounds* in all the world (save and except the matters in question in this cause, and also his wearing apparel).

To pay no fees.

The pauper, upon the order being made, may sue out his writ without stamps, pay no fees to any of the officers; no stamps are used for the *record*, *venire*, or *hab. corp.* nor do you pay for *setting down the cause*, or *return of hab. corp.*

Unless he reco-
rs 5l. or more.

But if you recover a verdict, the officers take the court fees, and in them they include passing the record, &c. if above five pounds, the pauper being by them deemed *diver*. The declaration is in the common form, to which you annex a copy of the petition, order, and affidavit, and deliver to defendant's attorney. If the defendant brings error, you must pay the clerk of the error his fees.

Declaration.

To consider the mode upon which this act of the 11 H. 7. is construed, every man who has humanity must feel for the pauper.—The law hath pro-

Paupers.

provided, that a man who is not worth five pounds in the world, shall sue without the payment of fees, on account of his *extreme poverty*; yet he, in the first instance, pays a duty to the king of 3s. and for the judge's fee 2s. 6d. oath 1s.; then if he obtains a verdict for above 5l. he is to pay court fees, 2l. 16s. 8d. and passing his record at least 1l.; that upon the whole he is to pay without receiving one farthing, upwards of 4l. when he is admitted to sue on account of his extreme poverty, besides 7s. 4d. for signing his judgment.

I think, if the judges knew this to be a fact, there could be no doubt but that their humanity would induce them to alter this mode, as they might make a rule upon the attorney for the plaintiff (in case of a verdict, and he receives the debt and costs), that he shall pay to every officer their fees, or be liable to be struck off the roll on complaint made; or permit the defendant's attorney to pay them to the prothonotaries for the use of the several officers; and if a reference was had to the statute, I have no doubt but that such was the intention of the legislature.

The plaintiff may, at any time pending the suit, petition to prosecute in *forma pauperis*. *Andr.* 306.

If the party give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall from thenceforth be dispaupered, and not afterwards be admitted again in that suit to prosecute in *forma pauperis*. He is not liable to pay costs, but be in the discretion of the court, whether he shall be punished or not. *Stat.* 23 H. 8. 2 *Salk.* 506. But *Holt* said, there is no officer to whip him, nor did he ever know it done. *Ibid.*

He is not liable to pay the costs for judgment as in the case of a nonsuit. 3 *Wils.* 24.; nor to pay the costs before he brings a new action, if it does appear that he has not been vexatious. *Str.* 878. If he has been vexatious as giving six notices of trial, and not proceeding, the court will dispauper him, but not make him pay costs. *Ibid.* 983.

A person

No fee to be paid to counsel or attorney.

Not liable to pay costs.

Nor for judgment, as in the case of a nonsuit.

May be dispaupered, if vexatious.

'A person admitted in *forma pauperis*, can only sue in that cause for which he is admitted; so that if any other cause arises, he must be admitted again *de novo, et sic toties quoties.*" *Lil. Reg.* 633.

A pauper shall not pay costs, though dispaupered; if taken in execution for costs, he shall be discharged upon motion. *Fort.* 320. 1 *Roll. Rep.* 81.

It has been denied to a defendant to defend in *forma pauperis*, in this court, *Barnes* 328.; likewise very lately by Mr. J. Gould.

Consolidating of Actions.

How to consolidate.

Barnes 176.

IF there be two or more actions brought upon the same policy of assurance against the underwriters, or two or more ejectments on the demise of the same lessor of the plaintiff for the same premises, and they proceed separate, the defendants may apply to the court by way of motion to consolidate such actions *; if in term time, it is a rule to shew cause, if in vacation, by way of summons, before a judge; and upon their undertaking to be bound, and concluded, in all the actions, by the fate of the verdict in the action brought against the first defendant, and to bring no writ of error, the court will stay all the proceedings in the last actions, until further order; but all the rules must be paid for separate, as also the summonses and orders thereon; and if the verdict turns in favour of plaintiff to the satisfaction of the judge who tried the cause, the plaintiff may proceed to tax his costs on that verdict, and get the defendant's attorney to attend the prothonotaries, who will tax the costs in the other actions, which if complied with (as is usual), and they are not paid with the debt; move the court upon an affidavit of the facts, for leave to enter up the judgment, and take out execution thereon; and that the prothonotary may tax the costs in all the causes, and for the costs of the application; one stamp for the affidavit is sufficient, which the court

court will order, after the costs are taxed, they are to be paid within a limited time, if not, sign the judgments upon a double half-crown stamp, and take out execution thereon; you pay for separate rules, and terjeant's fees are not fixed.

Abatement by Death.

THE general rule to be observed in this case is, that where the death of any party happens, and yet the plea is in the same condition as if such party were living, there such death makes no alteration or abatement of the writ. 10 *Mod.* 251. *Gil. C P.* 247.

By the 8 & 9 *W. 3. c. 11. sect. 6.* " If any plaintiff happen to die after an interlocutory judgment, and before final judgment obtained, the said action shall not abate therein, if such action might be originally prosecuted, or maintained by the executors or administrators of such defendant, and a *scire facias* may be had thereon.

" That if there be two or more plaintiffs or defendants, and one or more of them should die; if the cause of such action should survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not thereby be abated; but such death being suggested upon the record, the action shall proceed against such defendant or defendants surviving." *Ibid.*

By the stat. 17 *Car. 2. c. 18.* " it is enacted, ^{Death of either party between verdict and judgment, not error.} That the death of either party between verdict and judgment, shall not be alledged for error, so as judgment be entered within two terms after such verdict."

If either party die before the assize, it is out of ^{Death before assize, suit abates, if after the day not.} the statute; but if after the assizes, though before trial, it is no error; for the assizes is but one day in law. *Salk. 8. pl. 21. 9 Ld. Raym. 1415.* If

after verdict, and before the day in bank, the plaintiff dies, and the defendant signs judgment the second term after the verdict, this is within the statute, and the same as if he had entred judgment on the roll. *Sid.* 385. 1 *Wils.* 302.

Ejectment
against baron and
feme, baron dies
between the day
of nisi prius and
day in bank, it's
good against the
feme.

An ejectment against baron and *feme*, after verdict for the plaintiff, baron dies between the day of *nisi prius* and the day in bank; adjudged that the writ should stand good against the *feme*, because it is in the nature of a trespass, and the *feme* is charged for her own act, and the action survives against her; so if the wife had died, the baron should have judgment entred against him. *Cro. Jac.* 356. *Cro. Car.* 509. *Roll. Rep.* 14. *Moor* 469.

If feme takes husband after verdict, and before the day in bank, she shall have judgment, but a *sci. fa.* must be sued out before execution.

If a *feme sole* plaintiff after verdict, and before the day in bank, takes husband, she shall have judgment, *Cro. Car.* 232. but a *sci. fa.* must be sued out before execution.

If pending an argument, plaintiff dies, the suit does not abate.

If pending an argument on a special verdict, and the court takes time to consider thereon, the plaintiff dies, the judgment will be ordered to be entered up as of the term in which judgment ought

to have been signed, 1 *Burr.* 226.; the like may be done if the defendant dies. *Ibid.* 147. 4 *Burr.* 2277. Yet his representative must sue out a *scire facias* before he can have execution; and if execution is executed without it, it shall be set aside, and the money levied returned. 1 *Wils.* 302.

A *feme sole* cannot abate her own writ by marriage, for this would be taking advantage of her own act. 2 *Roll. Rep.* 53.

If she is sued, and takes husband, writ does not abate.

If a *feme sole* is sued, and after she takes a husband, it is no abatement of the writ; for the plaintiff would be in a fine condition, if after they have arrested a woman, she shall be allowed to overthrow the proceedings by a subsequent marriage. *Ld. Raym.* 1525. 2 *Str.* 811.

If there are two suits pending for the same cause of action, the second suit shall not be.

The law abhors multiplicity of actions; and therefore, whenever it appears upon record, that the plaintiff has sued out two writs against the defendant

fendant for the same thing, the second writ shall abate: For if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer *ad infinitum*; but then it must plainly appear to be for the same thing. *Mod.* 418. 539. 5 Co. 61.

Suggestion on Record.

LONDON, (ff.) *G. D.* late of, &c. merchant, was attached to answer *A. B.* and *E. F.* of a plea of trespass on the case; and thereupon the said *A. B.* by *S. U.* his attorney, comes, and the said *E. F.* cometh not; and the said *A. B.* gives the court to understand, and be informed, that after the issuing the original writ, and before the return thereof, and before this day, to wit, on the day of at London aforesaid, to wit, in the parish of *St Mary-le-Bow*, in the ward of *Cheap*, the said *E. F.* died, and the said *A. B.* survived him, which the said *C. D.* doth not deny; and thereupon the said *A. B.* by his attorney aforesaid, complains, *For that whereas*, the said *C. D.* on the day of in the year of our Lord 1782, to wit, at London, &c. was indebted to the said *A. B.* and the said *E. F.* his partner, in 20*l.* of lawful money, &c. for divers goods, wares, and merchandizes, by the said *A. B.* and *E. F.* in his life time before that time sold, &c.

Go to the end of the issue. The same day is given to the parties aforesaid here, &c. then say, Before which day, to wit, on the day of in the year aforesaid, at London aforesaid, in, &c. the said *A. B.* suggests to the court here, according to the form of the statute in such case made and provided, that the said *G. H.* died, and the said *A. B.* survived him, which the said defendant doth not deny: And the said defendant by his said attorney came; but the said sheriff did not send the said writ, nor did he do any thing thereon, therefore as before, it is commanded to the said sheriff, that he cause to come before our

Suggestion on the declaration of the death of one of the plaintiffs after writ sued out.

Suggestion of the death of one of the plaintiffs after issue joined.

said Lord the King, here, on
twelve, &c. by whom, &c.
and who neither, &c.

Suggestion of
the death of one
of the defendants
after verdict.

To the end of the *posse*, And upon this the
said plaintiff says, that after the last continuance of
the plea aforesaid, to wit, on the day of
in the year aforesaid, at, &c. in the
county aforesaid, the said C. died, and this is not
denied; therefore let all farther proceedings against
the said C. cease; whereupon the said plaintiff
prays judgment against the said J. for the da-
mages, costs, and charges aforesaid, by the jury
aforesaid in form aforesaid assessed, to be adjudged
to him, &c. therefore it is considered, &c.

Suggestion of the
death of one of
the defendants in
the *jurata* of the
record, when it
ought to have
been upon the
nisi prius record,
and before the
jurata, right sug-
gested on the
roll, and held
good.

Upon a writ of error it appeared, that the death of
Rebecca Savil Far was suggested in the *jurata* of the
record of *nisi prius*, and not in the usual way, and
afterwards the death was suggested upon the roll in
the usual way. The error assigned was, "That
there is no record of *nisi prius*, and that judgment
is given for the plaintiff below, whereas it ought
to have been given for the defendant;" then a *cer-*
tiorari issued, to certify the record of *nisi prius*,
which was done, and in *nullo est erratum* pleaded
by defendant in error; the objection taken was,
that it ought to have been suggested upon the *nisi*
prius record, and that it is not sufficient in the *ju-*
rata. Lord Mansfield—The suggestion, award,
and all the proceedings shew, one of the defendants
to be dead; and there is an award for the proceed-
ings to stay, as to this defendant, and to go on
against the other only; and the jury is awarded as
against the living one, the other being dead; both
were alive when the issue was joined; a day was
given to the parties, one defendant is awarded to
come, the other not, and the sheriff doth not re-
turn the writ, and a new *venire* is awarded, to try
the issue against the surviving defendant, and it is
properly awarded upon the issue-roll, and acknow-
ledged. The *nisi prius* roll is only for the direction
of the judge, to try it; and it is not traversable on
the roll, the judgment is right enough. 1 Bur. 363.

After

After issue joined, and before the day of *nisi prius*, one of the defendants died, plaintiff sued out a *ven. fac.* between him and the surviving defendant, and made the *jurata* agreeable thereto. Verdict for plaintiff, objected at the trial, that the death of the deceased defendant ought to have been suggested on the record of *nisi prius*, and thereupon an award entred of a *ven. fac.* between plaintiff and the surviving defendant. The point reserved was now argued, and thereupon the plaintiff now produced the roll in court, wherein the *suggestion* and *award of the ven. fac.* as above, were entred, which the court held to be sufficient. No continuances are necessary to be inserted in the record of *nisi prius*. *Doe v. Farr. Barnes* 469.

Suggestion on the London Act.

“BY 3 Jac. 1. c. 15. s. 4. If in any action of A creditor suing in another court shall pay costs, and recover none.
 “debt or action upon the *case*, upon an *assumpsit*
 “for the recovery of any debt, to be sued or prosecuted against any citizen and freeman of the
 “city of London, in any of the king’s courts at Westminster or elsewhere, out of the court of Requests, it shall appear to the judge where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to 40s. and the defendant in such action shall duly prove, either by sufficient testimony or his own oath, to be allowed by any judge or judges of the said court, that at the time of the commencing such action, such defendant was inhabiting and residing in the city of London, or the liberties thereof, that in such case the said judge shall not allow the plaintiff any costs of suit, but shall award him to pay costs to the defendants.”

By 14 Geo. 2. c. 10. “It shall and may be lawful to and for every citizen and freeman of the city of London, and every other person or persons who do or shall rent or keep any *shop, shed, stall, or stand, or seek a livelihood*, in the said city or liberties thereof, which now have, or shall hereaf-

“ter have any debts owing, not exceeding 40s.
 “by any persons whatsoever, *inhabiting*, or *seeking*
 “a *livelibood*, within the said city or liberties
 “thereof, during their respective *inhabiting* within
 “the said city, &c. or *seeking a livelibood*, as afore-
 “said, to cause such debtor to be summoned to ap-
 “pear before the commissioners, &c.”

The *Writter*,
 and most of the
 other acts, must
 be pleaded,
 Affidavit.

If the plaintiff does not recover the sum of 40s.
 against any the persons above described, the defend-
 ant may, the next term after verdict, apply to the
 court upon affidavit, “*That he was at the time of*
 “*commencing the action, an inhabitant and resident*
 “*within the city, &c.*” for a rule to shew cause,
 “*why a suggestion should not be entred upon the re-*
 “*cord,*” pursuant to the stat. 3 Jac. 1. Serjeant’s
 fee is half a guinea, which is drawn up at se-
 condaries; serve copy on plaintiff’s attorney, and
 if no cause shewn, make affidavit of the service
 thereof, and move to make it absolute; serjeant one
 guinea; tax the costs on the rule with the protho-
 notary upon his appointment.

Who is within
 the act.

A captain of a *Portuguese ship* that lay on board it,
 and constantly at the *Royal Exchange*, was held to
 be a person within the 14 Geo. 2. c. 10. by the
 court below, and had costs allowed him.

If judgment goes
 by default, no
 suggestion.

But if the defendant suffer judgment to go by
 default, he shall not be entitled to a suggestion for
 not being in court, he shall not be received for that
 purpose. *Brampton v. Crabbe*. Str. 46.

Costs to be al-
 lowed on appli-
 cation.

The costs of the application shall be allowed in
 the taxation, as well as of the former proceedings.
 Str. 1120.

Who is not to
 be bound by the af-
 fidavit.

It must appear by the affidavit to ground the sug-
 gestion, that the plaintiff and defendant are citizens
 of *London*, and that the cause of action arose within
 the city, 1 Wils. 20. 2 Wils. 68. and it’s not dis-
 cretionary in the court, but they are bound to grant
 the suggestion. *Ibid*.

Damages given
 by verdict under
 40s. defendant
 resident in *Middle-*
sex, and liable

Verdict for plaintiff for 1l. 8s. 9d. defendant (the
 damages being under 40s.), upon an affidavit that
 he was resident in *Middlesex*, and liable to be sum-
 moned to the county court, there moved for leave
 to

to enter a suggestion of that fact upon record, pursuant to *Stat. 23 Geo. 2.* no certificate having been granted at the trial, to prevent defendant's taking advantage of that statute, in opposition to this motion, no affidavit denying the fact contained in defendant's affidavit, was produced by plaintiff, but it was sworn that defendant before trial offered plaintiff 2*l* 2*s.* and costs; and it was observed that plaintiff had given evidence on some, not on all the counts in his declaration, that he had proved a larger debt than 40*s.* which had been reduced by a set-off on defencants, part to the sum recovered, and that if plaintiff had been nonsuited, he would have been liable to single costs only. The court held they were bound by the finding of the jury. Rule absolute for leave to enter the suggestion; plaintiff may traverse it, if he thinks fit afterwards, the suggestion having been entered. Defendant moved for judgment thereupon. Rule. that unless plaintiff plead to the suggestion by the first day of next term, it is to be taken for true, and prothonotary is to allow double costs to defendant according to the statute. *Fitzpatrick v. Pickering. Barnes* 470.

On trial at *Guildhall*, the plaintiff proved 4*l*. 15*s.* 3*d.* due to him, which was discharged by a set-off to 1*l*. 13*s.* 3*d.* the defendant moved upon 3 *Jac. 1. c. 15.* for a suggestion, but the court held, he was not intitled to the benefit of that act, for it was plain the real demand was above 40*s.* and how could the plaintiff tell whether the defendant would set off any thing in that action so as to be bound to chuse that jurisdiction; besides, he has in effect recovered 4*l*. 15*s.* 3*d.* because a debt which he must have otherwise paid is now satisfied. The plaintiff had judgment for the 1*l*. 13*s.* 3*d.* and his costs. *Str. 1159. Pitts v. Carpenter.*

But if the plaintiff's demand be for 15*l*. 3*s.* 9*d.* and when paid and reduced to 1*l*. 13*s.* 9*d.* by payments made under the plea of *non assumpsit* to plaintiff (and took no advantage of his notice of set-off), it was held that a suggestion upon the act might be entred. *Larnes* 470. *Beusen v. Hamming.*

354.

Discontinuance.

DISCONTINUANCE is a word compounded of *de* and *continuo*, for *continuo* is to continue without intermission; by addition of *de* (*Euphonia grata dis*) to it, which is privative, it signifieth an intermission; *discontinuo* *nihil aliud significat quam intermittere, desuescere, interrumpere*; and it is a very ancient word in law, and hath divers significations, as a discontinuance of process where it ought to be continued; so likewise of pleadings, &c. or discontinuance of the suit, where it is brought wrong, or the plaintiff does not think proper further to prosecute his suit. *Co. Lit. 325. a.*

After demurrer joined and entered, cannot discontinue without motion.

The plaintiff cannot discontinue his action after demurrer joined and entered, or after a verdict on enquiry, without leave of the court. *Cro. Jac. 35. 1 Lil. Abr. 473.* It has been ruled that plaintiff may discontinue upon motion after a special verdict, which is not complete and final, but never after a general verdict. *1 Salk. 178. 1 Nels. 663.*

But before or after declaration he may by side-bar rule.

The plaintiff may, if he sees occasion, discontinue before or after declaration delivered, by applying to the secondaries in term time for a treasury rule; but you must go before the judges for that purpose; pay rule 4s. 6d. get appointment thereon to tax the costs by the prothonotary, then make copy, and serve it on defendant's attorney; if he does not attend, make another copy, and take another appointment thereon, which serve as before, and so the third time; if no attendance, the prothonotary taxes the costs *ex parte*, which must be paid forthwith, as the rule is conditional, and has no effect until payment is made. But in *replevin* the avowant cannot have a rule. *Str. 112.*

Feigned Issue.

THIS is generally directed either by the court of Chancery or Exchequer, where in a suit, a matter of fact is strongly controverted, these courts being

being so sensible of the deficiency of trial by written depositions, that they will not bind the parties by their decree, but direct the matter to be tried by a jury; especially such important facts as the validity of a will, or whether *A.* is heir at law to *B.* or the existence of a *modus decimandi*, or real and immemorial composition for tithes; therefore, as no jury can be summoned to attend the *Chancery*, the fact is usually sent to be tried by the court of *King's Bench*, or this court, upon a feigned issue, wherein the plaintiff declares, that he laid a wager of 5*l.* with the defendant, that *A.* was heir at law to *B.*; and then avers that he is so, and brings his action for the 5*l.* The defendant allows the wager, but avers that *A.* is not the heir to *B.* and thereupon the issue is joined.

N. B. These courts direct the fact to be tried by the decree, and who is to be plaintiff and defendant, and also that the attorney for the defendant shall forthwith appear and plead. A writ is taken out in the common way, and all the proceedings are as in common cases, except that there is no imparlance allowed, the decree ordering him to plead forthwith.

By this mode the dispute is to be determined, which saves all the formality of pleading, and a great expence to the parties.

But if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life, or in tail is created, or whether a future interest devised by a testator shall operate as a remainder, or an executory devise; it is the practice of the court of *Chancery* to refer it to the court of *King's Bench*, or this court, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor.

To proceed therefore in this matter, a case is settled by the serjeant on both sides, and signed; then move for a *concilium* the same as on a demurrer; set down the case with the secondary, and deliver each judge a copy of the case as settled.

Popular Actions.

Compounding them.

No informer
shall compound
with defendant,
but by the con-
sent of the court.

FOR redressing of divers disorders in common informers, and for better execution of penal laws, it is enacted by the 18 *Eliz. c. 5. §. 3.*

“ That no informer or plaintiff shall or may compound or agree with any person or persons that shall offend, or that shall be furnished to offend against any penal statute, for an offence committed, or pretended to be committed; but after answer made in court unto the information or suit, in that behalf exhibited or prosecuted: Nor after answer, but by the order or consent of the court, in which the same information or suit shall be depending. That if any person shall offend, in making of composition or other misdemeanor, contrary to the true intent and meaning of this statute, or shall by colour or pretence of process, or without process, upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without order or consent of some of her majesty’s courts at *Westminster*, and shall be thereof convicted, shall stand on the pillory, &c. and for ever be disabled to pursue, or be plaintiff or informer in any suit or information, upon any statute, popular or penal; and shall also forfeit ten pounds, &c.” *Stat. 4.*

Penalties given
to persons c-
tain, not gene-
rally.

“ Provided also, That this act shall not extend to any suit already depending, nor shall restrain any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty, or suit is, or shall be specially limited or granted by virtue of any statute, and not generally to any person that will sue, but that every such certain person, body politick or corporate, which might

“ sue

“ sue or inform, as if this act were not made, may,
 “ in such case, sue, inform, and pursue, as he or
 “ they might have done, if this act were never had
 “ or made.” *Stat. 6.*

It seems clear both from the preamble and the whole tenor of this statute, that it extends only to suits by common informers, and not to those by a party grieved. *2 Haw. 279.*

In an action upon the statute 18 *Eliz. c. 15.* against defendant for making and selling gold rings, of less fineness than statute directs; it was moved for leave to compound, and a case was cited of *Bell qui tam, v. Wyate. Trin. 1733*, where there was no consent, and yet the court in that case gave leave to compound, *per cur.* It is in the discretion of the court to give leave to compound, and afterwards they refused the motion. *Howell qui tam v. Morris. B. R. 1 Wils. 79.*

Poole moved for leave to compound on the part of the prosecutor upon the statute of gaming, upon an affidavit, that the defendant and one *A. B.* used to play at cards together, and that the defendant had won divers sums of money of *A. B.*; that *A. B.* was become a bankrupt, and that the assignees, who let this prosecution on foot, were satisfied with respect to the defendant, and the court granted the motion. *Ibid. 130.*

The plaintiff brought a *qui tam* upon the stamp act against the defendant, for marrying without a licence; and had him in execution, where he had lain some time. And now *Torke* cited 18 *Eliz. c. 5. s. 3.* and produced an affidavit of the poverty of the defendant, and had the leave of the court, that the plaintiff might compound with the defendant. *Bradshaw v. Mottram. 1 Str. 167.*

Action on statute of usury. Defendant pleaded. Motion by *Draper* for leave for the prosecutor to compound on the *Stat. 18 Eliz.* *Boyle* consented for the defendant; and a rule was made pursuant to the motion. *Barnes's Notes, 118. Band v. Featherstone.*

On compound-
ing a penal ac-
tion, the king's
part of the com-
position to be
paid first.

On an action *qui tam*, for offences against the Lottery act, it was moved last term on the part of the defendant *Ellis*, in order to avoid imprisonment, and consented to by the plaintiff, and so ordered by the court, that the plaintiff have leave to compound with the defendant for 25*l.* being a moiety of the penalty; so that 25*l.* be also paid into the hands of one of the prothonotaries for his Majesty's use. And now *Dacey* moved for an attachment against *Ellis*, for not having paid the king's moiety, upon an affidavit that he had paid the 25*l.* to the plaintiff's attorney; who swore he believed, when he received it, that the king's moiety had been previously paid. Rule to answer the matters of the affidavit; which was afterwards discharged, on the prothonotary's certificate of the subsequent payment of the said 25*l.* *Wood qui tam. v. Ellis and another. 2 Black. Rep. 1154.*

On a bona fide,
but not on a col-
lusive composi-
tion, the plain-
tiff may also be
allowed a rea-
sonable sum for
his costs.

Leave given to compound an action for the penalties of the Lottery act, at 50*l.* for the King, and 50*l.* for the plaintiff, besides 60*l.* towards the plaintiff's costs; the King's part being first paid to the prothonotary at the making of the rule. *Wood qui tam v. Johnson. 2 Black. Rep. 1157.*

Denied upon a
small composi-
tion.

But it was denied at 5*l.* 5*s.* for the King, and 5*l.* 5*s.* for the plaintiff, and 30*l.* towards costs, such composition being manifestly collusive. *Ibid. 1157.*

How to move.

This motion is made by a serjeant, fee 10*s.* 6*d.*; plaintiff must also give a brief to a serjeant to consent to the motion; and before rule is drawn up, the King's moiety must be paid to one of the prothonotaries, who will give a receipt for same; take it to the secondaries office, and draw up rule; pay according to length.

Arbitration.

ARBITRATION, or arbitrage, is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels,

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or

or personal wrong, to the judgment of two or more arbiters or arbitrators, who are to decide the controversy: And if they do not agree, it is usual to add, that another person be called in an umpire (*imperator* or *impar*), to whose sole judgment it is then referred; or frequently there is only one arbitrator originally appointed. This decision, in any of these cases is called an award; and thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice. Experience has shewn the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult, and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them, as well in controversy where causes are depending, as those where no action is brought, and which still depend upon the rules of the common law: Enacting by Stat. 9 & 10 W. 3. c. 15. "That all merchants and
 " others, desiring to end any controversy (for which
 " there is no other remedy but by personal action
 " or suit in equity), may agree that their submission
 " to arbitration or umpirage of any person, &c.
 " shall be made a rule of any of his Majesty's
 " courts of record; which agreement, &c. shall,
 " upon producing an affidavit made by the wit-
 " nesses thereunto, or any of them, in court, be
 " entered and filed of record of the said court; and
 " a rule shall thereupon be made by the same court,
 " that the parties shall submit to, and finally be
 " concluded by the arbitration or umpirage, &c.;
 " and in case of disobedience, the party neglecting
 " shall be subject to all the penalties of contemning
 " a rule of court; unless such award shall be set
 " aside for corruption or other misbehaviour in the
 " arbitrators or umpire, proved on oath to the
 " court, before the last day of the next term, after
 " the award is made." In consequence of this
 statute, it is now become a considerable part of the

Merchants, &c.,
 desiring to end
 controversies by
 arbitration, may
 agree that sub-
 mission to the
 award of any
 person.

In case of dis-
 obedience, every
 neglecting sub-
 mitter is liable
 to attachment,
 unless, &c.

business

business of the superior courts to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt as is awarded, for disobedience to those rules and orders which are issued by the courts themselves. But in a case where the parties attempted to set aside an award, *Lord Hardwicke* said, that the only ground to impeach an award is, collusion, or gross misbehaviour of the arbitrators, or otherwise it is final and binding upon all parties, otherwise no persons would ever undertake to be arbitrators. 3 *Atk.* 529. *Lord Mansfield* in another case, said, that the court will not enter at all into the merits of the matter referred to arbitration, but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the misbehaviour on the arbitrators. 2 *Burr.* 701.

Where the objections arise upon the face of the award, they may be made at any time; but where the party complains of corruption or ill practice, he must do it within the second term. *Barnes* 56. *Stephens v. Browning*.

N. B. This means after a rule of reference.

If an award is made, then to proceed by making the submission a rule of court.

If an award is made, and the party will not perform it, such as not paying the money, &c. at the time and place therein mentioned, and you have attended for that purpose ready to receive it; full proceed to make the submission a rule of court, upon an affidavit of the due execution of the bond thus:

Affidavit of the due execution of the bond.

C. G. of, &c. make oath, and saith, That he was present at the time of signing and sealing the bond or obligation hereunto annexed, and *C. D.* of, &c. therein mentioned, did duly sign, seal, and as his act and deed deliver the said bond, in the presence of this deponent, and that the name *C. D.* set and subscribed opposite the seal of the said bond, is of the proper hand-writing of the said *C. D.* and that the name *C. G.* set and subscribed as the witness thereto,

thereto, is of the proper hand-writing of this deponent.

This affidavit is to be ingrossed on a treble six-penny stamp paper; give it to a serjeant "to move" How to proceed to get an attachment. "to make the submission a rule of court," pay him 10s. 6d. draw up the rule with the secondary, pay according to length, make copy thereof, and of the award, with the names of the arbitrators and witnesses, then the person who is to receive the money must demand the money, which not being complied with, make the following affidavit to move for an attachment, and also an affidavit of the due execution of the award; which see in p. 672.

A. B. Plaintiff.
and
C. D. Defendant.

A. B. of Fleet-street, London, grocer, maketh oath and saith, That he this deponent did, on the 4th day of June last, personally attend from the hour of one until the hour of two of the clock in the afternoon of the same day, at the Mitre Tavern, Fleet-street, London, and then and there demanded of the above named C. D. who also attended, the sum of 50*l.* awarded due to this deponent, pursuant and agreeable to a certain award in writing which is hereunto annexed; but the said C. D. did not then pay to this deponent the said sum of 50*l.* or any part thereof; And this deponent further saith, That having, on Thursday next, after one month from Easter Day, in this present Easter term, caused the submission of this deponent, and the said C. D. to the said award contained in a certain bond or obligation, bearing date the first day of May 1782, to be made a rule or order of this honourable court, he this deponent, on the day of , served the said C. D. with a true copy of the said rule or order of this honourable court, and at the same time shewed him the said original rule or order; and this deponent further saith, That he did at the same time demand of him the said C. D. the said sum

How to proceed to get an attachment.

Affidavit of the Plaintiff and respondent.

The place mentioned in the award.

sum of 50*l.* so awarded due to this deponent as
afore said; but the said *C. D.* did not pay the same
to this deponent; and this deponent further saith,
the whole of the said sum of 50*l.* now remains due
and owing to this deponent, pursuant to the said
award.

How to move
for the attach-
ment.

Give affidavits to a serjeant, "*to move for an at-
tachment for not paying the money on the award in
pursuance of a rule of court,*" see 1*cs.* 6*d.*; it is a
rule to shew cause, therefore draw up same with the
secondary, and serve copy thereof; make affidavit
of the service of said rule, and shewing the original,
then give serjeant one guinea with it to make it ab-
solute, which being done, draw up rule with the se-
condary, and then make out an attachment, sign it
with prothonotaries, seal 7*d.* get a warrant thereon,
and give it to your officer, pay him one guinea for
the caption. The common attachment for a con-
tempt will do, only put the substance of the rule at
the foot thereof.

How to proceed
on a rule of re-
storation.

It is best for the attornies to get their witnesses
sworn in court whilst they are there, pay 2*s.* each,
enter their names on a piece of paper, and the cause;
give it to the crier for that purpose.

Get order of *nisi prius* from Mr. Randall, or if at
the assizes of the *judges associate*, upon which the ar-
bitrator will appoint a time and place for both par-
ties to meet; and plaintiff's attorney serves a copy
of the order of *nisi prius* on defendant's attorney,
give arbitrator (if an attorney or counsel), the briefs
that were delivered, if not, a copy of the case on
each side, and names of the witnesses.

If arbitrator does
not make his
award in time,
may be enlarged.

If the arbitrator does not finish in time, you may
enlarge the order by consent; but first move that the
order of *nisi prius* may be made a rule of court,
which is done by giving the order to a serjeant for
that purpose; see 1*cs.* 6*d.*, draw up rule with se-
condary, pay according to length, serve copy on
the opposite attorney, then give brief to a ser-
jeant, with 1*os.* 6*d.* to move to enlarge; and the
other side also gives a brief to a serjeant to consent;

see

fee 10s. 6d. draw up rule with the secondary, pay according to length : an appointment must again be made by the arbitrator at the foot of the rule, and a copy made and served as before, on the opposite attorney, to attend.

When the award is made, the arbitrator's attorney gives notice to the attornies, that the same is ready, and that each may have his part on such a day, on payment of his expences. Award.

If the award is in favour of the plaintiff or defendant, costs are of course given as to the suit by the rule, therefore get an appointment from the prothonotary at the foot of the rule of court, to tax the costs ; serve copy thereof, and appointment, on the plaintiff's attorney, and upon attendance, the prothonotary will tax the costs, and mark them on the rule ; and if the party against whom the award is, does not pay the money, make a copy of the rule of court, and the prothonotaries *allocatur* thereon, and also a copy of the award, and let your client the plaintiff first examine copies thereof, then let him deliver the copies to the (*defendant*) ; shew the *original order and award*, and demand the money, *viz.* the sum awarded, and the costs, if he does not pay them, move on the following affidavit for an attachment. How to proceed after award made.

N. B. A letter of attorney may be made for this purpose, but it is too expensive, as there must be an affidavit of the due execution, and the attendance.

A. B. of, &c. the plaintiff in this cause, maketh oath and faith, That he this deponent, on the day of last, personally served the above defendant with a true copy of the rule and *allocatur*, and also a true copy of the award hereunto annexed, and at the same time shewed him the original rule, *allocatur*, and award, and demanded of him the said defendant the payment of the sum of 20*l.* awarded due to this defendant by *H. G.* of, &c. the arbitrator named in the said award, and also the payment of the sum of 1*l.* for the costs mentioned and allowed to him the said plaintiff in the said cause ; but the said defendant refused to pay the same, or any part thereof, Affidavit of service of rule, and allocatur for costs and the demand of the money.

thereof, and the same still remains due and owing from him the said defendant to this deponent.

Affidavit of due execution of the award to be made by one of the witnesses. *W. T.* of, &c. gentleman, maketh oath and saith, That he did see *W. G.* of, &c. sign, seal, publish, and declare his final award and arbitrament between *A. B.* of, &c. merchants, and *C. D.* of, &c. woollen draper, bearing date the day of , 1782; And this deponent further saith,

That the name *W. G.* set and subscribed against the seal as the party executing the said award, is of the proper hand-writing of the said *W. G.* and that the names *W. T.* and *J. E.* set and subscribed thereto as witnesses, attesting the execution of the said award, are of the respective hand-writing of this deponent and the *J. E.*

When bail is taken, and a verdict is taken, how to proceed. Frequently where there is bail, and a reference is proposed at the trial, the plaintiff, to save the bail, takes a verdict, subject to the reference; in that case, when the award is made, if in favour of the plaintiff, he may make his election whether he will proceed or not under the rule of reference, or on the verdict: If he proceeds in the latter, the costs must first be taxed, copy rule and award, serve same and demand the sum awarded, and costs, in the same manner as if he meant to proceed under the rule; and on affidavit of service of the rule, the prothonotaries *allicatur* thereon, and a copy of the award, and demand of the money, move the court that the *posse* may be delivered to the plaintiff, in order to take out execution for the money awarded and costs, which being made, draw up the rule as usual with the second day, make affidavit of the service, and shewing the original, and on motion the court will make the rule enforceable; draw up same, and apply to the marshal for the *posse*, who, on producing the rule, will give it to you; sign judgment with the prothonotaries (first flapping the *posse*); get the prothonotary to tax the costs, and then take out execution. *N.B.* You are entitled to all the subsequent costs. If the award is for a less sum than the verdict is for, enter a *remittitur* on the roll, and levy for the sum awarded and costs only.

Verdict

Verdict for plaintiff for security. Reference by rule to three of the jurors. Award in plaintiff's favour. Rule obtained to shew cause why the *posse* should not be delivered to plaintiff, to take out execution for the money awarded. Objection by defendant, that no affidavit was produced of the due execution of the award, or of a demand of the money, which the court held to be as necessary as if the motion had been for an attachment; and the rule was discharged. *Read v. Garnett. Barnes* 58.

The court will compel a witness to make an affidavit of the execution of the bond.

How to proceed by Original Quare Clausum fregit.

BEFORE the statute of 19 H. 7. c. 9. which allowed the writ of *capias ad respondendum* in actions on the case, a practice was introduced in this court, of commencing the suit by an original writ of trespass, *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*, which by the old common law subjected the defendant's person to be arrested by writ of *capias*, and then afterwards by connivance of the court, the plaintiff might proceed to prosecute for other less forcible injury. This practice still continues, and saves the trouble of serving the defendant personally with a writ of *capias*; for if the defendant, upon the sheriff's summons, left at his house, and he having returned notice on the writ to the defendant, does not appear, a *disfringas* issues against his goods; and if he does appear, the plaintiff may declare against him in any action he shall think proper, and after judgment, purchase a *special original*, to warrant the proceeding, which will prevent the judgment being arrested or reversed.

How to proceed. Therefore the first step necessary to be taken is, to make a *præcipe* for the curfitor of the county where defendant dwells, thus :

Præcipe for the original. London, (fl.) Original *quare clausum fregit*, for John Denn, against Richard Fenn, late of London, hosier, broke the close at London, returnable before his Majesty's justices at Westminster, in eight days of St. Hilary. J. Y. Attorney:

Take this to the curfitor for London, and he will make out and seal the original, pay 4s. 6d. then get a summons from the sheriffs, pay 2s. 4d. give it to your officer, and he will warn defendant, pay him 5s. each defendant. On the *quarto die post* of the return, search at the filacer's for the appearance ; if none, get original returned by the sheriffs, and file same with the *custos brevium*, pay 4d. he will give you a note of the name of the cause, and sheriff's return, which take to the filacer, pay 6d. ; if the return be *notice* to the defendant, then make make out a writ of *distingas*, in the following form : ingross same on a 2s. 6d. stamp parchment, make a *præcipe*, pay signing with the filacer 2s. 6d. seal 7d. take it to the sheriffs office, and they will grant a warrant to distrain defendant's goods to the value of 40s. give it to your officer, and if he levies, pay him 10s ; get the *distingas* returned, then make out an *alias* thereon, which being signed and sealed as before (no appearance being entred), you may move to increase the issues in the treasury, the same as against peers ; and also move to sell them in the same manner. If the defendant appears, then declare against him, and proceed as in other actions. N. B. As to the *venue*, if it be a *transitory action*, may be laid in any county, and declare generally, as in other cases.

Distingas.

George the Third, &c To the sheriffs of London, greeting: We command you, that you distrain Richard Fenn, late of, &c. hosier, by all his lands and chattels in your bailiwick, so that neither he,

nor any one for him, do intermeddle therewith, until you shall have another command in that behalf from us; and that you answer us for the issues of the same, so that he be before our justices at *Westminster*, on the morrow of *All Souls*, to answer *John Denn* in a plea, wherefore with force and arms he broke the close of the said *John* at *London*, to the great damage of the said *John*, and to hear judgment for his many defaults; and have you there this writ. *Witness, &c.*

London. *Distringas* for *John Denn* against *Richard Fenn*, late of, &c. hofier, trespass at *London*, returnable on the morrow of *All Souls*. *Præcipe.*

If the defendant appears, he enters it with the *Appearance*, filacer of the county where the original is directed; pay 2s. 6d.; and to prevent a *distringas* issuing, it must be done on the *quarto die post* of the return of the original.

London, (ff.) *Appearance* for *Richard Fenn*, late *Præcipe* for the of *London*, hofier, at the suit of *John Denn*, to an *appearance*. original *quare*, &c. returnable in eight days of *St. Hilary*. *J. K. Attorney.*

Corporations.

CORPORATIONS aggregate must sue and defend by attorney; and therefore the proper process against them is by original, *Co. Lit.* 66. b. They cannot be outlawed, 10 *Cj.* 32. b.; nor can they be attached. As outlawry does not lie against a corporation, therefore trespass does not lie against them; for a *capias* and *exigent* do not go. *Bro. Abr.* title *Corp.* 43. *Præcipe* to be filed with *Custia brevium.*

If a corporation sue, they must sue in the name of the corporation, by an attorney appointed under the seal of the corporation.

And if sued, it must be sued by its name of incorporation by original writ: and in order to sue a corporation, the plaintiff's attorney must make out a *præcipe* for an original writ, which must be taken

to the curfitor of the county where the *venue* is laid; after it is fecled, take it to the sheriff's office, and get a summons thereon, pay 2s. 4d. officer 5s.; if they appear, then proceed against them as in other cases; if not, upon *summoniri fecit* being returned by the sheriff, file the original with the *custos brevium*, pay 4d. and for an abstract of the writ and return 6d.; make out a *distringas* as against a member, and proceed to distrain in the same manner: but I believe it seldom happens that a *distringas* goes, as their town clerk generally appears, if of a *borough or city*, if of a *college*, an attorney is properly appointed.

Capias ad respon-
and proceedings
thereon against
defendants in a
corporate capa-
city set aside,
they should be
sued by pone
and distringas.

Defendants, the bailiffs and burgessees of *East Retford*, were sued in their corporate capacity, by common *capias ad respondendum*; and upon affidavit of service, an appearance was entred according to the statute; and plaintiff entred a declaration in the office, reciting that defendants *were attached to answer*, which cannot be. Defendants moved to set aside the *capias* and proceedings thereon; objecting, they ought to be sued by *pone* and *distringas*. And the court were of opinion, that as defendants are sued in a corporate capacity, the *capias ad respondendum* is null and void; and rule to shew cause was made absolute. It was agreed, that had the defendants themselves appeared, the objection had been waived. *Barnes* 415.

But a corporation may sue in the common way as others, by *capias*.

Declaration a-
gainst a corpora-
tion.

Oxon, (ff.) The mayor, bailiffs, and commonalty of the city of *Oxford*, were summoned to answer *John Denn*, in a plea of trespass on the case; and whereupon the said *John*, by S. U. his attorney, complains, *That whereas*, the said mayor, &c.

Appearance.

The appearance is entred with the filacer, and a *præcipe* is made thus: *Oxon*, (ff.) Appearance for the mayor, bailiffs, and commonalty of the city of *Oxford*, ats. *John Denn*, to an original returnable on the morrow of *All Souls*. J. K. Attorney.

Hun-

Hundredors.

IF an action be commenced against hundredors, the suit must be by original, and a *præcipe* is to be taken to the cursitors, and proceed as against corporations.

* To proceed against an hundred on the statute of hue and cry. 13 *Ed.* 1. the plaintiff must take out his original writ, which must be tested forty days after the robbery; which forty days are allowed for the hundred to take the thieves, by the statute of *Winton*, 3 *Lev.* 320.; and within a year after the robbery. 1 *Brownl.* 154.

The original writ usually recites the statute. *Th. Br.* 141. 2 *Saund.* 374. 4 *Mod.* 296. 1 *Bro. Entr.* 99. But the recital of the statute is not necessary, though it must state the circumstances of the robbery, and the plaintiff's compliance with the statutes. 13 *Ed.* 1. c. 1. 27 *Eliz.* c. 13. 29 *Car.* 2. c. 7. 8 *Geo.* 2. c. 16. 22 *Geo.* 2. c. 24. viz. "That he made hue and cry, gave notice of the robbery, described the felony, the time and place of the robbery; that within twenty days he caused notice thereof to be given in the London Gazette, described the robbers, and robbery therein; that he entered into bond before the sheriff to the high constable of the hundred, with condition for the security of the costs, in case of being nonsuited, discontinuing, &c.; that twenty days before the issuing of the writ, he made oath before a justice, that he did not know the parties who robbed him, and that the inhabitants of the hundred have not taken the robbers," &c.

The process served is a copy of the original writ, which process formerly used to be served on some inhabitant of the hundred. But by 8 *Geo.* 2.

c. 16. s. 4. it is enacted: "That no process for appearance in any action to be brought upon the statutes of hue and cry, or either of them, against any hundred, shall be served on any inhabitant thereof, save only upon the high constable, or next market day,"

“ high constables, of the hundred wherein the robbery shall happen; who is required to cause public notice thereof to be given in one of the principal market towns within such hundred, on the next market day after he or they shall be served with such process; or if there shall happen to be no market town within the hundred, then in some parish church within the same hundred, immediately after divine service, on the Sunday next after his or their being served with such process; and he or they is and are hereby empowered and required to enter, or cause to be entered, an appearance in the said action, and also defend the same for and on behalf of the inhabitants of the said hundred, as he or they shall be advised.”

The declaration need not recite the original at large, *Reg* 165; *Mills* 26.; nor more of the statute than is pertinent to the action, 2 *Vent.* 215.; and must conclude *contra formam statuti*. *Yelv.* 116.

If the defendants plead, and there is an issue, the *venire facias* shall be awarded to the next hundred, *Thef. Brev.* 144.; but see 29 *Geo.* 2. c. 18. s. 3. The *venire* shall be awarded *de corpore comitatus*, except the hundreds against which the action is brought.

If judgment be given against the hundred, the sheriff to shew the writ to two justices, who are to tax and levy the charges, as by *Stat. 27 Eliz.* c. 15.

If judgment be given against the hundred, the sheriff, &c. upon receipt of any writ of execution against any inhabitant, instead of serving the same, shall cause the same to be shewn *gratis* to two justices of the county, riding, or division (whereof one to be of the *quorum*), who are to cause such taxation and assessment to be made, and to be levied according to the 27th *Eliz.* (*viz.* by the constables, &c. rateably and proportionably, &c.), in which taxation and assessment, there shall be provided and included, over and above what the costs and damages recovered by the plaintiff in such action shall amount to, all such just and necessary expences, which the high constable of the hundred hath been at in defending

sending such action, claim being made thereto by such high constable, before the said justices, upon due notice for that purpose given him; and the money so to be levied, to be paid over by such constable, &c. within ten days after collection, to the sheriff of the county, to the use of the plaintiff in such action, for so much as his costs and damages recovered shall amount to, and to the use of the said high constable, for so much as his expences in defending the said action shall amount to; of which he shall give an account, and make proof thereof upon oath, to the satisfaction of the said justices, before any taxation shall be made for reimbursing such high constable; and shall, in such expences, have no further allowance, toward paying an attorney to defend the said action, than what such attorney's bill shall be taxed at, by the proper officer of that court where the action shall be brought, which the said high constable shall cause to be taxed for that purpose. *Stat. 8 Geo. 2. c. 16. s. 4.*

The money to be paid within ten days after collection to the sheriff for the use of the plaintiff.

The 7th section of the above act provides in what manner the constable shall be reimbursed his expences, in case the plaintiff is nonsuited, &c. and becomes, or his sureties in the bond, become insolvent.

Entry on the Roll of Sci. fa. against the Bail.

Middlesex, to wit. The sheriff was commanded, Vide p. 502.
Whereas Thomas Lime, of, &c. and *Richard Frame*, forgot to be entered.
 of, &c. lately in our court, to wit (here set forth the *sci. fa.* as far as the word "*expedient*"), then go on thus: And now at this day, the said *Henry* cometh here, by *S. U.* his attorney, and offered himself on the 4th day against the said *Thomas Lime* and *Richard Frame*, in the plea aforesaid; and they the said *Thomas* and *Richard*, although solemnly called, came not; and the sheriff, to wit, *Sir Barnard Turner*, Knight, and *Thomas Skinner*, Esquire, sheriff of the said county, now returneth, that the

said *Thomas Lime*, and *Richard Frame*, have not, nor hath either of them, any thing in his bailiwick, where or by which he can make known to them, or either of them, as by the said writ he is commanded; or are they, or is either of them, found in the same: Therefore, as before, the sheriff was commanded, That by good, &c. he should make known to the said *Thomas* and *Richard*, that they be here in eight days of Saint *Hilary*, to shew in form aforesaid: at which day the said *Henry* cometh here, by his attorney aforesaid, and offered himself on the fourth day against the said *Thomas* and *Richard*, in the plea aforesaid; and the said *Thomas* and *Richard*, although solemnly called, come not, and the sheriff, as before, now returneth, that the said *Thomas* and *Richard* (here copy return); and thereupon the said *Henry* prays execution against the said *Thomas* and *Richard*, to wit, against the said *Thomas*, of the said *gol.* by him in form aforesaid acknowledged, and against the said *Richard*, of the said *gol.* by him in form aforesaid acknowledged, according to the form of the said recognizance to be adjudged to him, &c. Therefore it is considered, that the said *Henry* have execution against the said *Thomas*, of the said *gol.* by him in form aforesaid acknowledged, and against the said *Richard*, of the said *gol.* by him in form aforesaid acknowledged, by their default, &c.

Judgment.

If the *scire facias*'s be of different terms, then the entry on the roll of the second *scire facias* must be thus:

If Sci. fa's. be of different terms, the entry is thus. *Middlesex*, to wit, *Heretofore*, as it appeareth in this same term, in the 713th roll, it is thus contained, *Middlesex*, to wit, The sheriff was commanded (to the end of the first entry on the roll made on the first *scire facias* and sheriff's return), vide p. 499.

Therefore, as before, the sheriff was commanded, that by good, &c. he should make known to the said *Richard* and *Thomas*, that they be here in eight days of the purification, to shew in form aforesaid: At which day, &c. (as in the last entry exactly).

Notices of Motion.

WHEREVER the proceedings are required by the party moving to be staid, in that case notice is necessary to be given the attorney on the other side, and affidavit made of the service thereof; as for instance, if the error happen in process, or the notice subscribed thereto, notice must be given of the motion, the like to set aside an interlocutory judgment or inquiry, the proceedings on a bail bond, to put off a trial for want of a material witness, for a new trial or arrest of judgment: But there is no necessity to give notice for leave to pay money into court, *concessions*, changing the *venue*, or for a special jury, or for leave to plead several matters.

Though in strictness in some cases, notice of motion may not be necessary, yet it will shew, that you took the first opportunity of informing the plaintiff he was wrong; therefore, I shall here give precedents of different notices, both with respect to those cases, as well as others which may happen.

You having been served with a copy of a *capias*, at the suit of the above-named plaintiffs *W. C.* and *R. W.* on the day of last, to appear the third day of *November* next, by your attorney, in his Majesty's court of *Common Bench*, and the said writ not being returnable, I do hereby give you notice not to appear thereto, there being a mistake in the said writ. Dated this first day of *November* 1783.
Your's, &c.

Notice not to appear to a writ where there is a mistake in it.

To Mr. *G. A.* the above defendant.

Take notice, That this honourable court will be moved to-morrow, or so soon after as counsel can be heard, that the interlocutory judgment signed in this cause, may be set aside for irregularity with costs, to be taxed by one of the prothonotaries, and in the mean time all proceedings be staid. Dated, &c.

To set aside an interlocutory judgment.

Take notice that this honourable court, &c. that the interlocutory judgment signed in this cause, and the inquiry, the

To set aside judgment and inquiry.

Notices of Motion.

the writ of enquiry executed thereon, may be set aside for irregularity with costs, to be taxed by one of the prothonotaries, and in the mean time all proceedings be stayed. Dated, &c.

To set aside the judgment and execution executed, and that the money paid, &c. be restored.

Take notice that this honourable court, &c. that the judgment signed in this cause, and the execution issued and executed thereon, may be set aside for irregularity with costs, to be taxed by one of the prothonotaries, and that the sum of 56*l.* levied and paid in the hands of the sheriff of *Middlesex*, may be restored to the above-named defendant, and the said sheriff retain the same in his hands, until the further order of this court, and that in the mean time all further proceedings be staid. Dated, &c.

To file common bail.

Take notice that this honourable court, &c. for a rule to shew cause why the defendant should not be permitted to file a common appearance in this cause, and in the mean time all proceedings be staid. Dated, &c.

To set aside all proceedings for irregularity.

Take notice that this honourable court, &c. to shew cause why all the proceedings in this cause should not be set aside for irregularity with costs, to be taxed by one of the prothonotaries, and in the mean time further proceedings be staid. Dated, &c.

To shew cause why it should not be referred to the master, to compute principal and interest upon bond.

Take notice that this honourable court, &c. for a rule to shew cause why it should not be referred to one of the prothonotaries, to compute the principal and interest due upon the bond in question, and why upon payment thereof, together with the costs to be taxed by him, the said bond shall not be delivered up to the defendant to be cancelled. Dated, &c.

To shew cause, why judgment should not be set aside, and plaintiff answer the matter of the affidavit.

Take notice that this honourable court, &c. for a rule to shew cause why the judgment signed in this cause should not be set aside for irregularity with costs, and why the plaintiff should not answer the matters of the affidavit, and in the mean time all proceedings be stayed. Dated, &c.

To shew cause, why the bail-bond, and the proceedings thereon, should not be set aside.

That this honourable court, &c. why the bail-bond assigned in this cause, and the proceedings thereon, should not be set aside with costs, to be

taxed, and in the mean time all the proceedings be stayed.

Take notice that this honourable court, &c. why the writ of *capias* issued in this cause should not be quashed, and why the plaintiff should not pay the costs of this application, and that the plaintiff may answer the several matters mentioned in the affidavit.

Take notice that this honourable court, &c. why the judgment in this cause, and the execution executed thereon, should not be set aside for irregularity; and why the money paid into your hands should not be restored to the defendant, and that in the mean time you retain the same until the further order of the court.

To the sheriff of the county of Middlesex, his bailiff and under sheriff.

Error.

A WRIT of error is a commission to judges of a superior court, by which they are authorized to examine the record, upon which the judgment was given in an inferior court, and on such examination to affirm or reverse the same according to law, 2 *Inft.* 40.; and any person damnified by error in record, or that may be supposed to be injured by it, may bring a writ of error, to reverse it, whether he be party or no; but principal and bail cannot join in a writ of error.

No person can bring a writ of error to reverse a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal thereof.

1 *Roll. Abrid.* 747. *Dyer* 90.

A writ of error that bears teste before the judgment is good; and this is the usual course for preventing and superseding execution. 1 *Vent.* 255. 96. *March* 140.

It

Cannot be brought after twenty years.

It cannot be brought after twenty years, and the statute of limitation must be pleaded to a writ of error, as well as to an original action. *Rep. Temp. Hardw. 346.*

If brought on a judgment in C. B. it must be returnable in K. B.

If an erroneous judgment be given in this court, the writ of error in all cases is made returnable into the court of *King's Bench*; and therefore if the defendant brings a writ of error to reverse the judgment, he must first make a *præcipe* for the curfitor in this form:

Præcipe for a writ of error.

Middlesex. Writ of error for *A. K.* against *C. D.* in case, on a judgment in the *Common Pleas* returnable —, wheresoever, &c.

J. B. Attorney.

Carry this *præcipe* to the curfitor's office, *Chancery Lane*, who will make out the writ, pay 14s. 6d. if no private seal, if a private seal 8s. 6d. more.

How to get it allowed.

As soon as you have it from the curfitor, take the same to Mr. *Hough*, the clerk of the errors, at Mr. *Pepys'* chamber, No. 10. in *Symond's Inn*, pay him for the allowance 2l. 2s. 6d. serve copy of the allowance on the plaintiff's attorney in the original action.

If bail is required, must be put in in four days.

If it requires bail, the plaintiff's attorney in error must put same in, before one of the justices of the *Common Pleas*, within four days next after the delivery thereof to the clerk of the errors, or an execution may issue. *R. M. 28 Car. 2.*

How to put in bail.

Take the names of the bail and places of abode to the clerk of the errors, and he will go with you to one of the judge's chambers, and there take the bail, pay him for same 1l. 4s. if at *Westminster*, 6s. 8d. more; give notice thereof to defendant's attorney in error.

Exception.

The defendant's attorney may, if he thinks proper, except against them, by entering same in the book of the clerk of the errors, within twenty days next after bail put in, and apply to the clerk of the errors for a rule for better bail; pay 4s. serve copy thereof on the plaintiff's attorney, which expires in four days.

The court refused to give time to perfect bail in error, because no real error could be suggested, so that

that they thought the writ of error was brought for delay. 2 *Wils.* 144.

If it's intended that the bail should justify, then the defendant's attorney will give notice thereof two days exclusive of the day, to justify same, the form of which notice is as follows; which must be done within four days after exception. *R. M.* 6 *Geo.* 2. *reg.* 6.

What notice of justification requisite.

In the Common Pleas.
In error.

C. D. Plaintiff,
and
A. B. Defendant.

Take notice that the bail already put in for the plaintiff in this cause on the writ of error, and of whom you have had notice, will, on Monday the day of next, justify themselves in this honourable court at *Westminster-hall*, in the county of *Middlesex*, as good and sufficient bail for the said plaintiff. Dated this day of 1782.

To Mr. J. K. Attorney for defendant } Yours, &c.
J. B. Attorney for plaintiff in error.

Where rule for better bail is served in vacation, defendant has not till the next term to perfect his bail, but ought to justify before a judge, and execution sued out for want of it held regular. *Barnes* 211.

The day before you intend justifying, go to the clerk of the errors, and desire him to attend with the bail-book, make affidavit of the service of the notice, give it to a serjeant "to move to justify the bail," pay him 10s. 6d. pay for the justification and court-fees 15s. in the evening draw up the rule for the allowance at the secondaries, pay 5s. serve copy on defendant's attorney.

If there is no bail required, as for instance, on judgment by default in case, trespass, and the like, the defendant in error upon the return of the writ gets a rule to transcribe (and the same is done by him, after bail perfected, as the next step); get same

Rule to transcribe.

same of Mr. *Hough*, pay him 4s. copy same, and serve on plaintiff's attorney.

How plaintiff's attorney in error is to proceed.

The plaintiff's attorney, before this rule expires, which is in eight days next after the service, may pay one guinea in part of the transcript to the clerk of the errors, and before it is complete the clerk of the errors will send for more.

I have heard that Mr. *Hough*, if there is time, will carry over the transcript in the same vacation, or if the rule be given in term, if he has time sufficient, he will take same in the last day of that term, which expedites the bringing a writ of error to a speedy determination, and had not used to be the case.

How defendant's attorney is to proceed, when no original filed.

If there be no original filed, and the vacation of the term in which judgment is signed is elapsed, the defendant's attorney must, before he takes out a rule to transcribe, petition the *master of the rolls* for an original, which ought to be returnable the term the declaration is delivered; therefore if you expect a writ of error, get the original allowed by the prothonotary, in the taxing of the costs, and make a *præcipe* for the original forthwith; which take to the curlitor, and he will make it out for you; for in case this is neglected, the master of the rolls will not order the original to be made out, "but upon payment of costs to the plaintiff in error, in case he does not further prosecute the writ;" a copy of the petition, and the master of the rolls order thereon, must be served on the plaintiff's attorney, and if he neglects to proceed, then no costs are to be allowed; pay for your order 5s. 6d. carry same to the curlitor, with a *præcipe*, and he will make out the original, which return in this manner (though it is usual to leave it with the sheriff of the county where the *venue* is laid).

Pledges to prosecute,

John Dor.
and
Richard Roe.

"The

“The within-named C. D. has not any thing in
“my bailiwick, whereby he can be “attached.” The
“answer of

Return of the
original in case;
if in debt, say
“summoned.”

“ William Gill, Esq;
and
“ William Nicholson, Esq; } Sheriff.”

When the original is sealed, and the return filed, carry it to the *custos breviarum* of the Common Pleas, in *Brick-court*, and file it; pay him 4*d.* for same, and 4*d.* every post-term after the return.

In the Common Pleas,
A. B. plaintiff,
and
C. D. defendant.

The humble Petition of the said A. B. the Plaintiff,

Humbly sheweth,

That your petitioner having, in *Earlier term* Petition.
1781, commenced an action at law against the
above named *C. D. late of Westminster, in the*
county of Middlesex, yeoman, in his Majesty's court
of Common Pleas at *Westminster*, in a plea of
trespass on the case, to his damage of 6*o*l and your
petitioner hath laid his *venue* in the county of *Mid-*
dlesex; and judgment hath been obtained in such
action in *Trinity term* last past, for 35*l*. damages,
and 1*o*l. 10*s*. costs, whereupon the said defendant
hath brought his writ of error, returnable in his
Majesty's court of *King's Bench* on the morrow of
All Souls, wherefore, &c. but no further proceed-
ings have been had thereon.

That your petitioner hath not as yet sued out any original writ to warrant the said judgment, and that he is advised it is necessary that the same should be sued out to warrant the said judgment, and the time for applying for the same in the ordinary course is expired, and that the curfitor of the said county cannot make out the same without an order from your Honour.

"Your

" Your petitioner therefore humbly prays your
 " Honour, to grant unto him an order,
 " that the curfitor of the said county of
 " *Middlesex* may issue an original writ in
 " this cause, out of this honourable court,
 " returnable in his said Majesty's court of
 " Common Pleas, on, &c.
 " *And your petitioner shall ever pray, &c.*"

Where the want of an original writ is assigned for error, and it appears that all the proceedings are of the same term wherein the original is returnable, such an original warrants these proceedings, let it be of any return of the same term; but an original of the term wherein final judgment is given will not warrant it, if by the record it appears that there has been proceedings in the cause in the term or terms before. 1 *Lev.* 69. *Yelv.* 108. 1 *Wils.* 182.

Make a tender of costs.

After service, make a tender of the costs in error to plaintiff's attorney, which if he accepts you may *non pros*, and take out execution.

If plaintiff's attorney proceeds in error, then how to proceed.

After service of the rule to transcribe, leave a copy of the proceedings with the clerk of the errors, and of the judgment (of course the roll is to be docketed and carried in).

After transcript delivered over to Mr. Heberden, each party makes a copy.

When the transcript is complete, defendant's attorney attends on the clerk of the errors, who will go with him to *Westminster*, and examine same; after it's examined, the clerk of the errors delivers over the transcript to Mr. Heberden, with the writ of error annexed; each party may take a copy upon paying 4d. *per sheet*; but it's incumbent on the attorney for defendant to make it forthwith, as it will be wanted in the future stage of the cause.

Defendant's attorney to sue out *sc. fa.*

Upon the delivery of the transcript over to Mr. Heberden, the cause is then said to be in the court of *King's Bench*, therefore the defendant's attorney will proceed by a *scire facias ad audiendum errores*, " to shew cause why execution should not be adjudged to the plaintiff," which is made returnable,

able, not on a day certain, but wheresoever the king shall then be, and tested, if the transcript be completed, the last day of term on that day, returnable the first day of the next term, if it's complete in vacation, and not delivered over till the first day of the next term, then it is to bear *teste* that day, and there must be *fifteen days* between the *teste* and *return*. Returnable, &c. Teste.

The writ of *sci. fa.* is to be signed by Mr. Heberden; pay 1s. 8d. seal 7d. and if left for a *nihil*, 1s. to the sheriff, if left for a *scire feci*, you have a summons thereon from the sheriff, pay him 2s. 4d. officer 5s. If there are two *sci. fa.*'s, the last need not lie four days in the office before the return, nor for a *scire feci*. 3 Burr. 1723. as against bail. With whom to be signed and sealed.

On the return day of the *scire facias*, if the defendant is *warned*, or upon a *nihil* returned on the *alias*, you must give a rule thereon at Mr. Cowper's, the clerk of the rules; write it on a piece of plain paper, thus: "*In error, C. D. against A. B. rule en sci. fa. J. A. attorney*;" pay for same 1s. 10d. which expires in four days, exclusive of the day given, upon which day, if there is no assignment of errors left with defendant's attorney in error, he may take out execution, but cannot *non pros* the error, till after the rule is given for such assignment, 4 Burr. 1772.; but mostly, as the plaintiff in error has gone so far, he will assign errors, which if he does, he had best deliver the common errors, as they are the cheapest; but he may assign the want of an original. On return to give rule for judgment.
If there is no assignment, may sign non pros.

For the rest of the proceedings in the King's Bench, *Vide my Instruct. Cleric.* p. 526.

By 3 Jac. 1. c. 8. it is enacted, "That no execution shall be stayed or delayed upon or by any writ of error, or *superfedeas* thereupon, to be sued for the reversing of any judgment given in any action or bill of debt, upon any single bond for debt, or upon any obligation, with condition for the payment of money only; or upon any action or bill of debt for rent, or upon any contract

“sued in any of the courts of record at *Westminster*,
 “&c. unless such person in whose name such writ
 “shall be brought, with two sufficient sureties,
 “such as the court wherein such judgment is or
 “shall be given, shall allow of, shall first before
 “such stay made or *superfedeas* be awarded, be
 “bound unto the party for whom any such judg-
 “ment is given, by recognizance to be acknow-
 “ledged in the same court, in double the sum ad-
 “judged to be recovered by the said former judg-
 “ment, to prosecute the said writ of error with
 “effect; and also to satisfy and pay (if the said
 “judgment be affirmed) all and singular the debts,
 “damages, and costs, adjudged upon the former
 “judgment; and all costs and damages to be also
 “awarded upon the delaying of execution.”

Bail in error on a judgment in debt on bond, are each bound in the sum recovered, that being double the sum due. 1 *Wils.* 213.

But bail is not requisite upon a judgment in an action of debt founded upon a prior judgment. 4 *Burr.* 1548. 1 *Black. Rep.* 506.

“No execution shall be stayed in any of the courts
 “of *Westminster*, &c. upon any writ of error or
 “*superfedeas* thereupon, after any verdict and judg-
 “ment thereupon obtained, in any action of debt
 “grounded upon statute 2 *Ed.* 6. for not setting
 “forth of tythes; nor in any action upon the *case*
 “upon any promise for payment of money, *actions sur*
 “*trover, covenant, detinue, and trespass*, unless such
 “recognizance, and in such manner as by the said
 “former act is directed, shall be first acknowledged,
 “in the said court where such judgment is given.”
 13 *Car.* 2. s. 9.

Sett. 10. Gives double costs to a defendant by delay of execution, by reason of error brought, if the judgment be affirmed.

Sett. 11. Provides, That the said statute shall not extend to actions popular; or upon penal statutes, indictments, &c. other than the statute of *Ed.* 6.

By 16 & 17 Car. 2. c. 8. s. 3. “No execution shall be staid after *verdict* and *judgment* in any *personal action* whatsoever, unless a recognizance be entred into according to the 3 Jac. 1. c. 8.”

“Not to extend to any writ of error to be brought by any executor or administrator, nor unto any action popular, nor to any penal action (except debt for tythes).” *Sec. 5.*

“That in writs of error to be brought upon any judgment after *verdict*, in any *writ of dower*, or in any action of *ejectione firmæ*, no execution shall be thereupon or thereby stayed, unless the plaintiff or plaintiffs, in such writ of error, shall be bound in such reasonable sum, as the court to which such writ of error shall be directed shall think fit; with condition, that if judgment shall be affirmed in the said writ of error, or that the said writ of error be discontinued, in the default of the plaintiff or plaintiffs therein; or that the said plaintiff or plaintiffs be nonsuit in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance or nonsuit had.” *Sec. 3.*

A recognizance in error in ejectionment, ought to be in the value of two years rent due. *Vide 4 Burr. 2501. Barnes 103.*; and double costs. *Ibid.*

The defendant may give two sufficient sureties if he pleases in ejectionment. *Barnes 75.*

Bail in error, cannot be put in before a commissioner in the country. *Barnes 78.*

Error on verdict in ejectionment allowed; but plaintiff in error entred into no recognizance, nor put in bail, as plaintiff below had not got the costs taxed, without which the measure or *quantum* of the recognizance could not be fixed. Plaintiff below, for want of the recognizance and bail, in four days, took out an *hab. fac. poss.* and had possession given him, which the court held to be regular, *et*

On error being brought, the plaintiff entered a recognizance as plaintiff, and got the costs taxed.

He should have applied to stay the execution.

per cur. Defendant should have applied to stay execution, and the court would have obliged plaintiff to have got his costs taxed. The writ of error is no *superfedas* without bail. A judge would have taken bail, if applied to. Rule discharged. *Barnes* 212.

On an amended writ of error, new bail must be given.

If a writ of error in *B. R.* on a judgment in *C. B.* is amended in *B. R.* new bail must be given to the amended writ in *C. B.*; and the plaintiff below shall not take out execution for want of bail. 2 *Black. Rep.* 1067.

Executors where the judgment is *de bonis propriis*, must put in bail.

If judgment be against an executor, or administrator *de bonis propriis*, and he brings a writ of error, he must put in bail in such cases, and pay costs if judgment be affirmed; but if judgment be *de bonis testatoris* only, he shall neither put in bail, or pay costs. 1 *Lev.* 245. 1 *Sid.* 368. 2 *Keb.* 295. 371. *Com.* 323. 2 *Cro.* 350. 1 *Sid.* 368.

In error after verdict on a *sci. fa.* against bail, there must be bail.

In error on a judgment after verdict upon a *sci. fa.* against bail, there must be bail to the writ of error. 2 *Black. Rep.* 1227.

In error on judgment in debt on bond, bail bound in the sum recovered, it being double the sum due.

On a judgment in debt on a bond in the penalty of 147*ol.* it was moved, to justify bail, each in 147*ol.*; on the other side it was insisted, that the bail ought each of them to justify in double the sum the judgment was given for; but *per curiam*, the sum recovered is double the debt really due; and it is sufficient for the bail to justify in 147*ol.* 1 *Wils.* 213.

Bonds that require bail.

There must be bail on a *bottomry bond*, *Str.* 476.; on a *second writ of error*, *ibid.* 527.; also on a bond given for the payment of 500*l.* being the sum mentioned in certain indentures, *ibid.* 959.; on bond for 300*l.* mentioned in a surrender or a copyhold, by way of mortgage, wherein judgment had passed by default, *Barnes* 78.; upon a bond conditioned to pay so much, as I shall appoint. 1 *Lev.* 117.

Bonds that require no bail.

But not on a bond for performance of covenants, *Barnes* 72.; nor upon a bond conditioned to pay for so much beer as should be delivered to S. not exceeding

exceeding 100*l.* after judgment upon demurrer, *Str.* 1190. 1 *Wils.* 19.; nor upon a bond for performance of an award, or on an obligation to indemnify, agreed by counsel on both sides. *Com. Rep.* 322.

Error on a bond, conditioned that *W. G.* was bound with the defendant, for a debt of the defendant's by bond, of the same date, to pay 51*l.* 10*s.* to *Lat. Ridley*, 30th *October*, in discharge of the recited obligation; it was held; that bail ought to be given. *Comyn's Rep.* 321. *Huddy and Ux, v. Gifford.*

It is ordered, That all writs of error shall without delay, be delivered to the clerk of the errors for the time being; and that no person shall be hindered from suing such execution, under pretence of any writ of error, before such writ of error be delivered to the clerk of the errors; and in cases where special bail is required, unless the plaintiff upon such writ of error shall, within four days after the delivery thereof, put in bail according to law, and obtain a writ of *superfedeas* thereupon, the defendant may proceed to execution notwithstanding. *R. M.* 28 *Car.* 2.

That in all cases where bail shall be filed on writs of error, such bail shall likewise be perfected within four days after exception taken thereio, or in default thereof, the clerk of the errors of this court shall *nonpro* such writs of error. *R. M.* 6 *Geo.* 2. *reg.* 6.

After error allowed, and notice, plaintiff executed a *fi. fa.* for want of bail in four days. Motion to let it aside, suggesting that plaintiff could not regularly take out execution, till after certificate from the clerk of the errors, that no bail was put in. Rule discharged. Such certificates have been frequently taken out of caution, but are not essentially necessary. *Barnes* 212.

An executor may revive the judgment, but cannot take out execution, pending a writ of error. *Barnes* 432.

Bail shall be given in debt upon the judgment, though a writ of error is brought, otherwise not. *Com. Rep.* 556. *2 Black. Rep.* 768.

Præcipe for Original, to warrant the Judgment in case Error is brought.

In case. *Middlesex, (ss.)* If *John Denn* make you secure, &c. then put, &c. *Richard Fenn*, late of *Westminster*, in the said county, merchant, that he be before our justices at *Westminster*, on the morrow of the *Holy Trinity*, to shew, *For that whereas* (here set forth the whole declaration *verbatim*) To the said *John* his damage of 50*l.* as is laid, &c.

In debt. *London. (ss.)* Command *Richard Fenn*, late of *London*, merchant, That justly, &c. he render to *John Denn* 100*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him, &c. Returnable before his Majesty's justices at *Westminster*, on the morrow of the *Holy Trinity*.

In debt against an executor. *London (ss.)* Command *Richard Fenn*, late of *London*, merchant, That justly, &c. he render to *A. B.* executor of the last will and testament of *J. K.* deceased 50*l.* of lawful money of *Great Britain*, which he unjustly detains from him, &c. Ret. (as before).

In covenant. *Middlesex, ss.* Command *Richard Fenn*, late of, &c. that he justly, &c. perform to *John Denn*, the covenant made between them, according to the force, form, and effect of a certain indenture made between them. Ret. (as before).

On all *præcipes quod reddat*, if the sum exceeds 40*l.* a fine is payable to the king in the following proportions :

	<i>l.</i>	<i>s.</i>	<i>d.</i>
From 40 <i>l.</i> to 100 marks	-	0	6 8
From 100 marks to 100 <i>l.</i>	-	0	10 0
From 100 <i>l.</i> to 200 marks	-	0	13 4
From 133 <i>l.</i> 6 <i>s.</i> 8 <i>d.</i> to 166 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i>	0	16	0

From

	l. s. d.
From 1661. 13. 4d. to 200l. - -	1 0 0,

And so consequently for every 100

marks more - - -	0 6 8
------------------	-------

And for every 100l. more - -	0 10 0
------------------------------	--------

Surry, to wit, Command *C. D.* late of *E.* in ^{Præcipe in ac-} the county aforesaid, gent. That he render to *F. G.* count, his reasonable account, for the time which he was receiver of the money of him *F.* &c.

If a bailiff, then as before, to account for the ^{If a bailiff.} time in which he was bailiff of him *F.* in *E.* &c.

If a bailiff and receiver, then, for the time which ^{If bailiff and re-} he was his bailiff in *E.* and receiver of the money of ^{ceiver.} him, *F.* &c.

Somerset, to wit, Command *C. D.* late of, &c. In detinue, yeoman, That he render unto *F. G.* one mare, one cow, &c. (as the case requires), of the price of ten pounds, which he unjustly detains from him, &c.

Somerset, to wit, Command *C. D.* late of, &c. In annuity, yeoman, That he render unto *F. G.* 100l. of lawful money of *Great Britain*, which to him are in arrear, of a certain annual rent of 50l. which to him he owes, and unjustly detains, &c.

No curfitor shall make, or permit to be made, ^{Original to be} within his respective office and division, any original ^{bespoke before} writs whatsoever, of any return past, unless he ^{the effoign day} shall receive the instructions for making thereof ^{of the succeed-} within the term wherein the said writs are to be ^{ing term.} returnable, or at farthest on or before the effoign day of the next succeeding term, without special warrant from the lord chancellor, or lord keeper of the great seal of *England*, or master of the rolls for the time being. *Lord Clarendon's orders in Chancery.*

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			For

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